DOCUMENT RESUME

ED 282 243 CS 210 547

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TITLE Clearing the Air about Cigarettes: Will Advertisers' Rights Go Up in Smoke?
PUB DATE Aug 87
NOTE 57p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (70th, San Antonio, TX, August 1-4, 1987).
PUB TYPE Speeches/Conference Papers (150) -- Viewpoints (120)

EDRS PRICE MF01/PC03 Plus Postage.
DESCRIPTORS *Advertising; *Federal Regulation; *Freedom of Speech; Mass Media Effects; Media Research; Public Health Legislation; *Smoking; Tobacco
IDENTIFIERS *First Amendment; *Media Role

ABSTRACT

Because recent restrictive changes in cigarette advertising laws have unknown consequences for advertisers, this report outlines the history of the controversy over whether to allow cigarette advertisements, explores its legal status with respect to First Amendment rights for advertisers, and considers potential solutions to the conflict between Congressional anti smoking factions and the print media. The first section reviews the history of tobacco use and regulatory efforts previously aimed at its advertising, while the second covers the second wave of regulations and private lawsuits stemming from cigarette ads. The third section outlines efforts by the U.S. Congress and the American Medical Association to ban cigarette sales, focusing for comparison on the effects of a Puerto Rican ad ban on casino gambling. The fourth section discusses 1986 Congressional hearings on banning tobacco ads and explains the legal consequences with respect to the loss of advertisers' First Amendment rights, and the fifth provides tests of the proposed ban for legality, substantial interest, advancement of government interest, and overbreadth. The sixth section gives details about why new warnings in cigarette ads probably will not work, and discusses problems of the new approach, such as advertising wearout, personal salience, and persuasion interference. The seventh section enumerates the consequences of a ban: (1) economic disaster would befall the print media; (2) tobacco companies would cease to sponsor socially beneficial events; (3) the regulatory technique would be extended to other products, such as alcohol; and (4) research on making tobacco products safer would cease. The conclusion summarizes the ban's relationship to the First Amendment. (SKC)

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CLEARING THE AIR ABOUT CIGARETTES: WILL ADVERTISERS'S RIGHTS GO UP IN SMOKE?

Jef I.Richards

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CLEARING THE AIR ABOUT CIGARETTES: WILL ADVERTISERS' RIGHTS GO UP IN SMOKE?

By Jef I. Richards *

During the past two years numerous attacks have been struck at the sellers of tobacco products. Rather than attack them directly, however, the target has been their advertising. Not only does this raise significant First Amendment questions, the logic behind these efforts is defective. Central to each action is the question of how effective the Surgeon General's Warnings in advertisements are or can be, yet very little consideration or research has been dedicated to answering this question.

The promotion of cigarettes has charred a long and cloudy path through the annals of advertising regulation, from a time when consumers were promised that cigarettes would cure or prevent a myriad of ills to the present hostile and litigious atmosphere which threatens both retribution on manufacturers of cigarettes and total abolition of their advertising. The ten months from October 1985 through July 1986, alone, evidenced a rapid turn of events that now dangles a singed cloud over the future of tobacco advertising; a cloud that could well leave tobacco stains on the First Amendment freedoms of the entire advertising industry.

The year 1985 ended with a fifteen-year-old health warning on cigarette packages and in cigarette advertisements being replaced by a new series of four alternating warnings.[1] This was almost immediately followed by a proclamation of war by the American Medical Association (AMA) and the Surgeon General of the United States, targeting cigarette makers and their advertising as the enemy.[2] At just about the same time a series of court decisions added new dimensions to the presence of health warnings in cigarette advertisements.[3] During Spring of 1986, a smokeless tobacco Act was passed, requiring health warnings on labels and advertising of "chewing tobacco" and other smokeless tobacco products, while at the same time banning their advertising from radio and television.[4] When Summer arrived, a Bill was introduced in Congress asking it to exorcise tobacco advertising from all media presently permitted to carry it.[5] Only three weeks later, on July 1, 1986, an astonishing and, to some, frightening decision was rendered by the United States Supreme Court, with implications which forced advertisers to reconsider the seriousness of

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1 Pub. L. No. 98-474, 98 Stat. 2204 (1984).

2 *See, e.g.*, Kilpatrick, *A Cigarette Ad Smoke Screen*, Nation's Business, February, 1986, p.6; Molotsky, *A.M.A. Expected to Call for Ban on Cigarette Ads*, New York Times, December 5, 1985, p.1, c.1.

3 Roysdon v. R.J. Reynolds Tobacco Co., 623 F.Supp. 1189 (D.C.Tenn. 1985); Palmer v. Liggett Group, Inc., 633 F.Supp. 1171 (D.Mass. 1986); Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3rd Cir. 1986).

4 *Comprehensive Smokeless Tobacco Health Education Act of 1986*, Pub. L. 99-252, 100 Stat. 30 (1986).

5 *Health Protection Act of 1986*, H.R. 4972, 99th Cong., 2d Sess. (1986).

the pending Congressional action.[6] That decision, as a result, laid the foundation for Congressional subcommittee hearings on that proposed tobacco ad ban, which began three weeks later.[7]

Many of the consequences of these recent activities are yet unknown, but the potential fallout for tobacco manufacturers, the advertising profession, and First Amendment rights generally, may be ominous. In the discussion that follows, the nature of the controversy will be outlined, the legal situs of tobacco advertising will be explored, and potential solutions to the conflict will be considered. This discussion will begin by providing some form to the controversy, through a brief review of the history of cigarettes and the regulatory efforts previously aimed at their advertising.

RISING FROM THE ASHES OF THE PAST

400 Years, B.S.G. (Before Surgeon General)

Today's conflict over the marketing of cigarettes grows out of a busy history of debate and concern over the health effects of these products and of the sales techniques used by their makers. While the heat of this debate is newly kindled, it was ignited hundreds of years ago.

Tobacco was introduced to the civilized world a little more than four centuries ago, in 1560, when the French Ambassador to Portugal, Jean Nicot, announced that he had acquired a remarkable American herb that had wondrous curative powers. As the natural consequence of this discovery, Nicot was honored by having this healing substance named after him: Nicotiana (the scientific name for tobacco).[8] This quickly proved to be a rather dubious honor.

In spite of Nicot's early health claims for tobacco, it was very quickly suspect as a harmful substance, and was far from being loved by all. Less than fifty years after its discovery, tobacco was described in an essay by James I of England as:

> a custome lothsome to the Eye, hateful to the Nose, harmful to the Braine, dangerous to the Lungs, and, in the black stinking Fume thereof, nearest resembling the horrible Stygian Smoke of the Pit that is bottomless.[9]

By the mid-1800s scientific evidence began to appear which seemed to disconfirm the beneficial

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6 Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 106 S.Ct. 2968 (1986).

7 *See, e.g.*, Colford, *Tobacco critics start battle for ad restrictions*, Ad. Age, July 21, 1986, p.1, c.3; Gloede, *Lotsa smoke, no fire. Ban tobacco ads? Marketers stay cool.*, Ad. Age, August 14, 1986, p.1, c.2.

8 Fritschler, *Smoking and Politics: policymaking and the federal bureaucracy 2d Ed.* 7 (1975) [Referred to hereafter as *Smoking and Politics*]. Smoking of other substances was practiced long before that time, for medicinal purposes. Tobacco, however, was native to the Americas, and its original users were Indians. The term "tobacco" derived from an Indian pipe called a "taboca." Christopher Columbus and his crew were the first Europeans to experience it, but it was Nicot who introduced it to France. The Consumer Union, *The Consumer Union Report on Smoking and the Public Interest* 122 (1963) [Referred to hereafter as *Consumer Union Report*].

9 From *A Counterblaste to Tobacco* (1604), quoted in Editorial Research Reports, *Consumer Protection Gains and Setbacks* 70 (1978). This habit was particularly hazardous to health in Russia during the 17th Century. The Czar of All the Russias threatened early tobacco users with having their noses slit for a first offense and with death for repeated violations. *Consumer Union Report, supra* note 8, at 123, 176.

qualities of tobacco.[10] Early in the 1900s medical research began to show that beyond there being no medicinal benefits, there might actually be a causal relationship between smoking and illness.[11] Anti-cigarette sentiments reached an early peak in 1913. Beginning at that time, small groups of social reformers sought anti-cigarette legislation in nine southern and western states. By 1929, however, this movement waned.[12]

As that initial attack on smoking ended, several scientific or quasi-scientific studies were announced establishing a connection between smoking and cancer. One English physician reported in a British medical journal in 1927 that in nearly every case of lung cancer of which he had personal knowledge the patient was a regular smoker.[13] In 1936 two American physicians announced in the Journal of the American Medical Association that of 135 men with lung cancer they had examined, fully 90% of them were "chronic smokers."[14]

While medical evidence mounted, the cigarette manufacturers were perfecting their sales pitches. The growing consciousness of the tie between smoking and health caused manufacturers to try defusing public concerns by extolling purported medicinal advantages of cigarettes ... advantages which apparently only the makers believed to exist.[15] *Camel* claimed to aid digestion, relieve fatigue, and never irritate the throat.[16] *Kool* claimed to be a shield against colds[17], as did *Philip Morris.*[18]

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Insert Figs. 1 & 2 About Here

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Several regulatory actions against cigarette firms occurred in the early 1940s. In 1942 the Federal Trade Commission (FTC) took action against *Lucky Strikes* and *Pall Malls*, followed by actions against several other brands.[19] Although the FTC saw a few successes from these attempts to enforce some modicum of honesty[20], it was generally impotent in these attacks on cigarette manufacturers. By the time

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10 *Smoking and Politics, supra* note 8, at 7 (1975).

11 *Id.*, at 17 (1975).

12 Sinclair, *The Era of Success* 180 (1964).

13 *Consumer Union Report, supra* note 8, at 25.

14 *Id.*, at 25 (1963).

15 "When unfavorable research findings were released, the manufacturers found ways to discredit and obliterate them in the public consciousness through more glamorous advertisements and intensified lobbying." *Smoking and Politics, supra* note 8, at 17 (1975).

16 *Consumer Union Report, supra* note 8, at 145 (1963).

17 *Id.*, at 146 (1963).

18 Figure 1 depicts a typical Philip Morris advertisement from the 1940s. It can bee seen, in Figure 2, that such health claims were not unique to that particular brand.

19 *Consumer Union Report, supra* note 8, at 145 (1963).

20 Some firms did agree to change their practices. In 1942, for example Brown & Williamson agreed to cease advertising that *Kools* "give extra protection" or are "excellent safeguard" during cold months, or by stating or implying that they constitute a remedy or protection from colds. Brown & Williamson Tobacco Corp., 34 F.T.C. 1689 (1942). A brand called "Juleps" was advertised with the phrase, "Remember Juleps, Forget Your Cough." The FTC decided that this implied that the cigarettes were a treatment or remedy for

the FTC staff investigated a particular advertising campaign, recommended action to the Commissioners, filed a complaint, and then followed it through administrative due process, the ads in question had already seen the end of their usefulness.[21] Manufacturers would simply commence a new campaign with different but similarly questionable claims.

In 1952, the FTC, as the result of a complaint filed ten years earlier, ordered *Philip Morris* to stop claiming that this brand was recommended by "outstanding nose and throat specialists."[22] *Philip Morris* responded the following year by claiming that only its brand was entirely free of the throat irritation found in all other leading brands.[23] Clearly, this was not terribly different from the claim already determined to be deceptive.

By the mid-1950s activity surrounding cigarette advertising began to intensify. In 1953 the AMA made its first entry into the controversy by banning tobacco advertising from all of its publications.[24] In 1955 the FTC adopted industry guides prohibiting cigarette sellers from stating explicitly or implicitly in their advertising that there is medical approval of cigarette smoking.[25]

The year 1957 saw a Congressional investigation begin, concerning claims about filter-tips on cigarettes. The House Subcommittee assessing this situation, chaired by Representative John A. Blatnik of Minnesota, issued a report charging that cigarette manufacturers had deceived the public. The report went on to accuse the FTC of failing "its statutory duty ... to approach the problems of false and misleading advertising with vigor and diligence."[26] Even though the Commission tried futilely to fight the tobacco giants, its relative inadequacy was viewed as a lack of diligence.

The following year the tobacco industry took counter-measures to defend against this groundswell of anti-tobacco sentiment. A lobbying and public relations group, called The Tobacco Institute, Inc., was formed to represent tobacco interests before the government and the consumers.[27] The industry appeared to be readying for a fight. Four years later that fight came to fruition.

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coughs, and the manufacturer agreed to stop using the "forget your cough" phrase. Penn Tobacco Co., 34 F.T.C. 1636 (1942).

21 *Consumer Union Report, supra* note 8, at 145 (1963). This is a common criticism of FTC prosecutions, since its primary power is ordering advertisers to cease and desist from making certain claims, rather than punishing them for making knowlingly deceptive claims. A typical advertising campaign is used for only a matter of months before it must be replaced with a fresh campaign, but a typical time-span from the start of an investigation until an FTC action is completed is *four years*. Cox, Fellmeth, & Schultz, *"The Nader Report" on the Federal Trade Commission* 72 (1969). A challenged ad was little more than disposable rubbish to the manufacturer by the time the FTC was ready to force the issue. This weakness has largely been corrected with the advent of corrective powers to act "retroactively" upon prior claims. Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C.Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

22 Philip Morris, 49 F.T.C. 703 (1952).

23 *Consumer Union Report, supra* note 8, at 146 (1963).

24 *Smoking and Health Council on Scientific Affairs*, 243 J. of the Amer. Med. Assn. 779 (1980). In 1968, the AMA House of Delegates again entered this debate by adopting a resolution calling for the AMA to take a strong stand against smoking, using every means at its disposal. *Id.*

25 20 Fed. Reg. 332 (1955).

26 *Consumer Union Report, supra* note 8, at 186 (1963).

27 *Smoking and Politics, supra* note 8, at 23 (1975).

Enter, the Surgeon General

For the tobacco industry, 1962 was an infamous year. It was in that year the Royal College of Physicians, in London, published a crucifying paper which left little question that a causal relationship existed between cigarette use and lung cancer.[28] It was also in that year the Surgeon General of the United States, Luther L. Terry, formed an Advisory Committee on Smoking and Health. The first meeting of that Committee was held on November 9, 1962, and its report was released just 14 months later on January 11, 1964.[29]

More than 15 bills were introduced in Congress between 1962 and 1964 aimed at either restricting cigarette sales or mandating the use of some form of health warnings to protect the public.[30] In the first set of legislative hearings after the Surgeon General's Report was released, held before the Senate Commerce Committee, the Tobacco Institute paraded 38 distinguished physicians, surgeons, and research scientists past the Committee to testify that in their respected opinions the report was inaccurate.[31] Michael Pertschuk, who later became Chairman of the FTC, states, "[T]he Tobacco Institute and their law firm, Covington and Burling, had combed the scientific universe to discover these thirty-eight. They were not representative. They were indeed, as one research scientist described them, a remnant of the 'Flat Earth Society.'"[32]

Before Congress acted upon these bills, the FTC acted with the "diligence" it had previously been criticized as lacking. In 1964 it promulgated a trade regulation rule requiring that all cigarette ads and packages display a warning that cigarette smoking is dangerous to health.[33] That ruling was to have taken effect on January 1, 1965.

Ironically, the Commission was accused of overstepping its powers and acting unconstitutionally.[34] It voluntarily suspended the cigarette rule pending hearings in Congress, and on July 27, 1965, Congress passed its own rule on cigarette advertising and labeling.[35] That Act made it unlawful to manufacture, import, or package cigarettes for sale in the United States without each package bearing the notice:

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28 Royal College of Physicians of London, *Smoking and Health — Summary and Report of the Royal College of Physicians of London on Smoking in Relation to Cancer of the Lung and Other Diseases* (1962). The major conclusions of this report were: "Cigarette smoking is a cause of lung cancer and bronchitis, and probably contributes to the development of coronary heart disease and various other less common diseases. It delays healing of gastric and duodenal ulcers." Reported in U.S. Department of Health, Education, and Welfare, *Smoking and Health — Report of the Advisory Committee to the Surgeon General of the Public Health Service* 8 (1964).

29 U.S. Department of Health, Education, and Welfare, *Smoking and Health — Report of the Advisory Committee to the Surgeon General of the Public Health Service* (1964).

30 *Smoking and Politics, supra* note 8, at 26 (1975).

31 Pertschuk, *Revolt Against Regulation: The Rise and Pause of the Consumer Movement* 65 (1982).

32 *Id.*, at 66 (1982).

33 Trade Reg. Rule, 29 Fed. Reg. 8324 (1964).

34 *Smoking and Politics, supra* note 8, at 13 (1975).

35 *Federal Cigarette Labeling and Advertising Act*, Pub. L. No. 89-92, 79 Stat. 282 (1965). As a result, the FTC withdrew its Trade Regulation Rule. 2 Trade Reg. Rep. #7939, at 12,921 (FTC 1965).

"Caution: Cigarette Smoking May Be Hazardous to Your Health." It, unlike the FTC's now preempted rule, required no such label in advertisements, and specifically prohibited the FTC from exercising its rulemaking powers against cigarette advertising.[36] The Tobacco Institute's parade of witnesses and other lobbying efforts apparently had some influence.

Two years later, in 1967, the FTC issued a report to Congress evaluating the effectiveness of the required labeling in curtailing cigarette consumption.[37] The Commission announced that the labeling had little or no effect on the public's attitude toward smoking, except that there had been some movement to brands with lower tar and nicotine. Further action, it determined, was necessary.

In 1970 Congress amended the Act to make a less ambiguous warning. This new warning now stated: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."[38] That notice was extended from package labeling to advertising in 1972, by an "agreement" between the FTC and the six major cigarette manufacturers in the United States.[39] At the time of these changes, however, a collateral attack on cigarette advertising was being undertaken by a New York lawyer.

Banzhaf Leads the Ban

Three cigarette commercials were aired on WCBS-TV in New York, on November 24, 1966, as others had regularly. These particular commercials, though, were singled-out for special attention by John F. Banzhaf, III, a young attorney. A few days later, on December 1, he petitioned the television station for equal time, to present views about the advisability of smoking which were not portrayed in those commercials.[40] The station's general manager felt that opposing views were adequately covered by Cancer Society ads and news reports, so he denied Banzhaf's demand. Banzhaf's response to this denial was a complaint to the Federal Communications Commission (FCC).

The FCC followed through by holding that, while precisely equal time was not justified, the "fairness doctrine"[41] applies to commercials, and that cigarette advertising raises "a substantial controversial

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[36] *Federal Cigarette Labeling and Advertising Act, id.* The FTC was later returned its rulemaking power regarding cigarette advertising, but was then required to give Congress six months notice of any plans to adopt a trade regulation rule affecting cigarettes. *Public Health Cigarette Smoking Act of 1969*, Pub. L. No. 91-222, 84 Stat. 87 (1970).

[37] 5 Trade Reg. Rep. #50,174, at 55, 289 (FTC 1967). This report, and a similar report by Health, Education, and Welfare, both appear at H.R. Rep. No. 91-566, 91st Cong., 1st Sess. 3-6 (1969).

[38] *Public Health Cigarette Smoking Act of 1969*, Pub. L. No. 91-222, 84 Stat. 87 (1970).

[39] Lorillard et al., 80 F.T.C. 455 (1972), *aff'd*, 527 F.2d 1115 (1975), *cert. denied*, 96 S.Ct. 2237 (1976). This case involved the enforcement of six cease and desist consent orders, involving the six manufacturers producing about 99 percent of the cigarettes made in the United States. 527 F.2d, at 1116.

[40] *See* discussion in Lynd, Banzhaf v. FCC: Public Interest and the Fairness Doctrine, 23 Fed. Com. B. J. 39 (1969). *See, also*, Wuliger, *The Constitutional Rights of Puffery: Commercial Speech and the Cigarette Broadcast Advertising Ban*, 36 Fed. Com. L. J. 1 (1984); Welkowitz, *Smoke in the Air: Commercial Speech and Broadcasting*, 7 Cardozo L. Rev. 47 (1985).

[41] *See, e.g., Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 25 R.R. 1901 (1941); *Applicability of Fairness Doctrine in Handling Controversial Issues of Public Importance*, 2 R.R.2d 1901 (1964). As the FCC first noted in Thomas W. Wilson, 11 R.R. 231 (1946): "... the general principle underlying the duty of station licensees is that there be fairness and objectivity in making time available for the discussion of all

issue of public importance" sufficient to require a station to permit broadcast time to present views opposing those of the cigarette advertisers.[42] Banzhaf appealed that finding, hoping to secure *equal* time for anti-smoking spokespersons, and appeals were also filed by the Tobacco Institute and others. The Court of Appeals affirmed the FCC decision *in toto*.[43] The result: so long as broadcasters continued to accept cigarette commercials, they must allocate a reasonable amount of time for anti-cigarette counter-advertising.[44]

Over the next couple of years the airwaves were profuse with point-counterpoint in the cigarette ad battle. The goal presumably sought by Banzhaf, to adversely impact cigarette consumption, seemed to be realized. A drop in cigarette use did occur.[45] Judge J. Skelly Wright, in 1971, observed:

> [A]fter Banzhaf, these advertisements triggered the anti-smoking messages which were having a devastating effect on cigarette consumption. Thus the individual tobacco companies could not stop advertising for fear of losing their competitive position; yet for every dollar they spent to advance their product, they forced the airing of more anti-smoking advertisements and hence lost more customers.[46]

The tobacco industry was pinned in a catch-22. If they stopped promoting, they would lose customers to other brands, but if they continued to advertise the entire industry would lose customers. Either way, their sales were destined to dwindle. The only plausible response was for the entire industry to stop using broadcast advertising, since the fairness doctrine did not extend to other media. Of course, if the manufacturers collaborated in a withdrawal *en masse* from the airwaves, they might have been vulnerable to legal attack based upon the antitrust laws.[47] Consequently, it was the cigarette makers, themselves, that lobbied for and ultimately obtained a legislative ban, prohibiting tobacco from being advertised on television or radio.[48] The ban was subsequently challenged by six broadcasting companies that were miffed

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sides of controversial issues of public importance." *Id.*, at 232.

[42] WCBS-TV, 8 F.C.C.2d 381, *aff'd on rehearing*, 9 F.C.C.2d 921 (1967). The FCC noted in its opinion that cigarette smoking had recently been shown to be a menace to health, and that very fact made it a controversial issue of public importance, thereby making cigarette advertisements a proper subject of the fairness doctrine.

[43] Banzhaf v. FCC, 405 F.2d 1082 (D.C.Cir. 1968).

[44] Although equal time was found to be unnecessary, a "safe" allocation of time for counter-ads was suggested to be about one counter-advertisement for every three cigarette advertisements. Leventhal, *Caution: Cigarette Commercials May Be Hazardous To Your License — The New Aspect of Fairness*, 22 Fed. Com. B.J. 55, 94 (1968).

[45] Warner, *The Effects of the Anti-Smoking Campaign on Cigarette Consumption*, 67 Amer. J. of Pub. Health 645 (July 1977); Hamilton, *The Demand for Cigarettes: Advertising, the Health Scene, and the Cigarette Advertising Ban*, 54 Rev. of Economics and Statistics 401 (Nov. 1972). Hamilton estimated that the deterrent effect of the counter advertising was almost six times more powerful than the sales stimulus caused by the cigarette ads. The estimate, however, is disputed by the FTC. Federal Trade Commission, *Staff Report on Consumer Responses to Cigarette Health Information* 3 (1979).

[46] Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 588 (D.C.D.C. 1971) (J. Wright, dissenting), *aff'd mem.*, 405 U.S. 1000 (1972).

[47] *Id.*, at n. 10.

[48] *Public Health Cigarette Smoking Act of 1969*, Pub. L. No. 91-222, 84 Stat. 87 (1970). This is a somewhat oversimplified explanation. Even before the Banzhaf decision had time to make a measurable impact, FTC Commissioner Elman had argued for banning cigarette ads from the airwaves. 5 Trade Reg. Rep. #50,174 (FTC 1967).

about losing the business of the cigarette advertisers, in *Capital Broadcasting Company v. Mitchell*[49], but the restriction was upheld.

This was the last major chess-move in the tobacco advertising dispute for over a decade.[50] The next thrust was by the FTC, and it was quickly followed with an exchange of legal blows.

THE NEW HEAT WAVE

The Warnings

The FTC made productive use of the lull that followed *Capital Broadcasting*. It produced reams of reports on the tobacco industry.[51] As a part of those investigations, the Commission staff studied the efficacy of the Surgeon General's Warning, which had appeared in ads and on packages since 1970.[52] The finding of that study was that the warning did little to warn the public of the true hazards of smoking.[53] The FTC, as a consequence, proposed a potentially more effective rotational series of warnings.[54]

In 1984 the federal code which demanded the long-used health warning was amended, requiring four alternatively-worded warnings, each providing more specific information than their predecessor, to be used in both labeling and advertising beginning on October 12, 1985.[55] This newest law requires each manufacturer to rotate the following sequence of warnings on a quarterly basis in accordance with a plan approved by the FTC:

> SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
> SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
> SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.
> SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.[56]

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49 333 F. Supp. 582 (D.C.D.C. 1971), *aff'd mem.*, 405 U.S. 1000 (1972). Judge Wright attached a scathing dissent, in which he stated, "The passage of the Public Health Cigarette Smoking Act of 1969 marked a dramatic legislative *coup* for the cigarette industry."

50 This is not to suggest that there was *no* activity. The FTC was busied doing research and publishing reports on the tobacco industry. During the mid-1970s its "diligence" in investigating the tobacco industry resulted in some publicity when one cigarette manufacturer dumped 14,000 pounds of documents on the front steps of the Commission in order to ridicule the agency's "bully" methods. Pertschuk, *supra* note 31, at 85 (1982). An amendment to the Federal Cigarette Labeling and Advertising Act, in 1973, extended the ban of advertising to "little cigars." Pub. L. No. 93-109, § 3, 87 Stat. 352 (1973).

51 *See, e.g.*, Federal Trade Commission, *Brand Performance in the Cigarette Industry and the Advantage of Early Entry, 1913-73* (1979); Federal Trade Commission, *Report of "Tar" and Nicotine Content of the Smoke of 176 Varieties of Cigarettes* (1979); Federal Trade Commission, *Staff Report on Consumer Responses to Cigarette Health Information* (1979); Federal Trade Commission, *Staff Report on the Cigarette Advertising Investigation* (1981).

52 *See* evaluation in Federal Trade Commission, *Staff Report on the Cigarette Advertising Investigation* (1981).

53 *Id.*, at 9.

54 *Id.*, at Appendix D.

55 *Comprehensive Smoking Education Act*, Pub. L. No. 98-474, 98 Stat. 2204 (1984). (15 U.S.C. §1331-39).

56 15 U.S.C. §1333(a).

The purpose of these new messages is to make the warning more effective. Obviously, if this is successful, it marks a major strike at the tobacco industry.

At the end of February, 1986, Congress passed the *Comprehensive Smokeless Tobacco Health Education Act of 1986.*[57] For the first time, the broadcast advertising ban and health warnings on labels and in advertising were extended to a tobacco product other than cigarettes.[58] This Act became effective in August of 1986.

Congress took steps to provide a new system of warnings. It also extended them from cigarettes to smokeless tobacco, after 21 years of warnings in labeling of the former. The operative question, then, is: ***Will the new warnings be effective?***[59] The answer to that question is central to the justification of these legislative actions, as it is to other challenges to tobacco advertising arising at about the same time.

The Lawsuits

A second, though collateral, attack recently experienced by the tobacco industry came by way of private lawsuits. This is not a new threat.[60] Suits against manufacturers, aimed at creating liability for lung cancer or other health maladies allegedly derived from cigarette use, have been frequent during the past quarter-century[61], and are extremely popular today.[62]

The very first lung cancer-cigarette case brought to trial by a victim occurred in 1955. In *Pritchard v. Liggett & Myers*[63], the plaintiff's action rested heavily upon advertising claims made by the tobacco firm many years earlier. One cited ad was a 1934 newspaper promotion for *Chesterfields*, promising, "A good cigarette can cause no ills and cure no ailments ... but it gives you a lot of pleasure, peach of mind and comfort."[64] Pritchard lost the case. In the end, the court found that the manufacturer was neither negligent, nor had it made any express warranties, and that the plaintiff had assumed the risk of using this

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57 Pub. L. 99-252, 100 Stat. 30 (1986).

58 The required warnings are the following, and must be rotated in a manner similar to those now used for cigarettes:

"WARNING: THIS PRODUCT MAY CAUSE MOUTH CANCER",
"WARNING: THIS PRODUCT MAY CAUSE GUM DISEASE AND TOOTH LOSS", or
"WARNING: THIS PRODUCT IS NOT A SAFE ALTERNATIVE TO CIGARETTES".

59 *See* discussion *infra*, text accompanying notes 205-58.

60 An early, but thorough, treatment of death or disability lawsuits against the manufacturers of cigarettes appears in Wegman, *Cigarettes and Health: A Legal Analysis*, 51 Cornell L. Q. 678 (1966).

61 *See, e.g.*, Lartique v. R.J. Reynolds, 317 F.2d 19 (5th Cir. 1963); Ross v. Philip Morris Co., 328 F.2d 3 (8th Cir. 1964); Pritchard v. Liggett & Myers, 295 F.2d 292 (3rd Cir. 1961); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962).

62 In the summer of 1986 there were about 100 lawsuits pending against tobacco firms for injuries or fatialities claimed to be the result of tobacco use. Chan and Lawlor, *Anti-Smoking Pressure Snuffs Butts*, USA Today, June 19, 1986, p. D1, at D2.

63 134 F.Supp. 829 (W.D.Pa. 1955), *rev'd*, 295 F.2d 292 (3rd Cir. 1961), *rev'd on rehearing*, 350 F.2d 479 (3rd Cir. 1965), *modified*, 370 F.2d 95 (3rd Cir. 1966), *cert. denied*, 382 U.S. 987 (1966).

64 295 F.2d, at 296.

product.[65]

Unlike those early cases, which turned solely upon the proof of warranty, negligence, intentional misrepresentation[66], or strict liability[67], the most recent cases have asked a somewhat different question: Do the Surgeon General's Warnings, which were implemented to protect the health of consumers, act as a shield from liability for the manufacturer? In other words, who were the warnings meant to protect? Strangely enough, even when cigarette opponents were initially fighting for inclusions of health warnings in cigarette labels and advertisements during the early 1960s, some parties voiced a concern that the warnings might benefit the manufacturers more than the consumers. Those concerns, however, were lost in the short-term goals of reducing consumption.[68]

The first such case to frontally address this issue was decided on December 18, 1985. In *Roysdon v. R.J. Reynolds Tobacco Company*[69], the United States District Court for the Eastern District of Tennessee faced a claim by Mr. Floyd Roysdon that his severe peripheral vascular disease was the proximate result of many years of smoking defendant's products. Roysdon alleged that the warnings on cigarette packages and in their advertising are inadequate to fully apprise users of the medical risks involved in smoking.[70] The court sidestepped the question of efficacy, however, by first asking whether the warnings must be ruled adequate *as a matter of law*.

R.J. Reynolds argued that Congress had preempted any claim based on the adequacy of the warnings, by section 1334 of the Federal Cigarette Labeling and Advertising Act.[71] The court agreed that the language forbade the state from requiring a health statement beyond that required by the Act, but that it did not expressly prohibit tort actions based on the inadequacy of the warnings.[72] In section 1331, however, it found the language that follows:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby —
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

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65 370 F.2d, at 95.

66 Wegman, *Cigarettes and Health: A Legal Analysis*, 51 Cornell L. Q. 678, 703 (1966).

67 *Id.*, at 715.

68 *See, e.g.*, Scripps-Howard News Service, *Warnings may have 'saved' cigarette industry*, The Capital Times (Madison, WI), April 17, 1986, p. 16, c.1.

69 623 F.Supp. 1189 (D.C.Tenn. 1985).

70 *Id.*, at 1190. A second claim, that the defendant's cigarettes are defective and unreasonably dangerous to the health of the users, was also confronted by the court. It determined, however, that the cigarettes are not "unreasonably dangerous" products. *Id.*, at 1192.

71 15 U.S.C. § 1334 (1982) reads as follows:

> (a) No statement relating to smoking and health, other than the statement required by section 1331 of this title, shall be required on any cigarette package.
>
> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

72 623 F.Supp., at 1190.

> (2) commerce and the national economy may be
> (A) protected to the maximum extent consistent with this declared policy and
> (B) not impeded by diverse, non-uniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.[73]

From this statement came the court's conclusion that congressional purpose was 1) to inform the public, and 2) to ensure uniformity of labeling. To expose a manufacturer to potential damages because of its labeling, according to this court, would be inconsistent with the second purpose, and would "permit a state to achieve indirectly, through exposure to tort liability, what it could not achieve directly through legislation."[74] So, while tort claims were not explicitly disallowed by the Act, they were implicitly preempted.

In the final analysis, this court decided that the warning does protect the manufacturer from liability, without ever answering the question of whether the "warnings" truly warn. According to this court, even if the warnings fail this first purpose, to inform, they must be made to fulfill their second purpose: uniformity. If the warnings are actually faulty, as the plaintiff suggested, the result is that the *only* benefit of the warnings is to protect the manufacturer. This is reminiscent of the ban of cigarette advertising from television and radio. It gives the appearance of being in the public interest while, in reality, it advances only the interests of the regulated manufacturers.[75] This seems a substantial convolution of congressional intent.

The court does not discuss the efficacy of the warnings, but it does state its belief that the public is adequately informed:

> It finds that tobacco has been used for over 400 years and that its characteristics also have been fully explored. Knowledge that cigarette smoking is harmful to health is widespread and can be considered part of the common knowledge of the community.[76]

That conclusion runs somewhat contrary to the findings of the FTC, which state:

> Over 30% of the public is unaware of the relationship between smoking and heart disease. Nearly 50% of all women do not know that smoking during pregnancy increases the risk of stillbirt and miscarriage. Approximately 30% of those polled do not know about the relationship between smoking, birth control pills, and the risk of heart attack ... approximately 20% of those polled do not know that smoking causes cancer.[77]

Although the risk of smoking is generally known, there is a substantial portion of the population for which the warnings are intended, because they do *not* know the dangers. For that population the success or failure of the warnings is quintessential to fulfillment of the congressional purpose on which the *Roysdon* court rests its finding.

Four months after the *Roysdon* decision, on April 18, 1986, a similar case was brought before the

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73 15 U.S.C. § 1331 (1982).

74 623 F.Supp., at 1191.

75 *Supra*, text accompanying notes 40-49.

76 623 F.Supp., at 1192.

77 Federal Trade Commission, *Staff Report on the Cigarette Advertising Investigation* 9 (1981).

Court of Appeals for the Third Circuit, in *Cipollone v. Liggett Group, Inc.*[78] Rose Cipollone had claimed that she began smoking in 1942, and developed lung cancer as a result. Her husband pursued the action after her death, alleging in part that the defendant cigarette manufacturers failed to warn of the hazards of cigarettes, advertised their products in a manner that neutralized the warnings actually provided — warnings made meaningless by the addiction created by cigarettes — and that the defendants ignored, failed to act upon, and conspired to deprive the public of medical and scientific data reflecting the dangers associated with cigarettes.[79]

The lower court in this instance agreed with *Roysdon*, that the Act prohibits a state from legislating additional warnings, but it disagreed regarding the common law claims, which it found were not preempted by the federal Act.[80] The Court of Appeals concurred with the determination that there was no express preemption of common law actions, but it found an implied preemption:

> [W]e conclude that claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore *actually conflict with the Act* ... [W]here the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.[81]

Once again, the cigarette manufacturers prevailed. Without concern for the efficacy of the warnings, the court decided that congressional purpose would be obstructed if it permitted common law tort claims based upon the adequacy of information provided to consumers. Never mind that such a decision discourages that manufacturers from volunteering additional health information to users; a result diametrically opposite from congressional desires to inform the public. Consistency, implies this opinion, must prevail over efficacy.

Only a few days after *Cipollone*, on April 25, *Palmer v. Liggett Group, Inc.*[82] was handed down by the District Court of Massachusetts. Joseph Palmer died in 1980, from lung cancer allegedly caused by his smoking L&M cigarettes since 1957. His wife and his mother filed suit, claiming that defendants were negligent in failing to provide adequate warnings.[83]

District Judge Mazzone acknowledged the decisions in both *Roysdon* and *Cipollone*, and expressed careful consideration of those opinions, but the decision that followed took quite a different view of congressional preemption. Judge Mazzone felt that there was neither express nor implied preemption to be read in the Act. Regarding the *Cipollone* finding that permitting common law claims would "actually

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78 789 F.2d 181 (3rd Cir. 1986), *cert. denied*, 107 S.Ct. 907 (1987).

79 *Id.*, at 184.

80 *Id.*, at 185.

81 *Id.*, at 187. [Emphasis added.]

82 633 F.Supp. 1171 (D.Mass. 1986).

83 *Id.*, at 1172.

conflict" with the Act, this decision remarks that "it would not be impossible to comply with the federal law and be subject to tort liability at the same time"[84] and that imposition of damages would not frustrate the Act's objectives.[85]

Regarding "impossiblity" of compliance, it states:

> [T]he Act does not exclude other warnings in addition to the federal one, it simply requires that the federal warning be present and prohibits states or the federal government from *requiring* any different warnings. So, if defendants choose to respond to tort liability by adding an additional warning, stronger than that currently required, they will not be violating section 1333.[86]

What this suggests is that there is no preemption of common law tort claims because they do not *require* additional warnings. If a manufacturer attempts to minimize liability by additional warnings, that is a voluntary action, and the Act does not bar the maker from volunteering information. However, if the realities of the liability resulting from use of this product demand an additional notice in order for the manufacturer to stay in business, it is the product and not the law which mandates that supplementary notice. A tort action is not preempted, because the tobacco company may pay that claim and continue to advertise without giving more information to its customers. The result may well be bankruptcy, but that is the result of product deficiencies, not of the court subverting the Act.

Finally, the *Palmer* decision addressed the possible frustration of the Act's objectives. It finds that courts considering other similar statutes have held that compliance with federal labeling requirements does not insulate a defendant from suit.[87] Judge Mazzone summarized:

> My basic disagreement with the Third Circuit opinion is that it *effectively immunizes the tobacco industry* when Congress did not expressly do so. I am unwilling to join the Third Circuit in finding immunity by implications in this case ... I am mindful of the potential for a dramatic increase in litigation in this area and the resultant burden on our courts and our society. The solution may be to regulate or circumscribe exposure to liability, but the solution must come from Congress, not the courts.[88]

This last decision represents another major blow to the tobacco industry. While the *Roysdon* and *Cipollone* cases, as shown, have some logical fallacies, it is unclear whether those cases or the *Palmer* opinion will prevail.

What is clear, though, is that if there is no preemption of tort claims, *ala Palmer*, the next issue to be confronted by the courts will be whether the warnings dictated by the Act are sufficiently effective as to preclude recovery by tort plaintiffs. On the other hand, if there *is* preemption, in accordance with *Roysdon* and *Cipollone*, the only health information that consumers are thereafter likely to receive from manufacturers is that which Congress requires. In that instance the burden shifts to Congress, to ensure

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84 *Id.*, at 1177.

85 *Id.*, at 1179.

86 *Id.*, at 1177.

87 *Id.*, at 1176.

88 *Id.*, at 1180 (emphasis added).

that the warnings adequately inform consumers about the risks they are taking. In either case, the question remains: *Will the new warnings be effective?*[89]

New cigarette warnings, the smokeless tobacco broadcast ban and warnings, and product liability lawsuits based upon inadequacy of the warnings, all threaten the future of the tobacco industry. Another threat, and one that may dwarf the foregoing to total insignificance, was developing almost simultaneously with these attacks.

SURGEON GENERAL'S WARNING: CIGARETTE ADVERTISING MAY BE HARMFUL TO YOUR HEALTH

Many years ago the Consumers Union, expressing concern about the effect of cigarette advertising on teenagers and their acquisition of the smoking habit, suggested, "The most direct approach to the problem of cigarette advertising, of course, would be to ban it altogether."[90] In December, 1985, the United States Surgeon General, C. Everett Koop, declaring that cigarette smoking is the number one cause of premature death or disability, recommended just such an absolute ban on advertising. At the same time an announcement was made that the AMA would be considering support of such a ban.[91] Subsequently the AMA House of Delegates approved a resolution calling for a legislative ban on advertising and promotion of all tobacco products, and began drafting a bill to present in Congress.[92]

On June 10, 1986, Oklahoma Congressman Mike Synar introduced the AMA draft legislation in the House of Representatives with the title, "Health Protection Act of 1986."[93] The Synar Bill proposes to prohibit advertising of any tobacco product, be it cigarettes, cigars, pipe tobacco, chewing tobacco, or snuff. It would apply equally to retailers, manufacturers, and almost anyone else who might wish to advertise tobacco products. All forms of advertising, including newspapers, magazines, billboards, decals, matchbooks, and all other written or other material used for promoting the sale or consumption of tobacco products would be precluded. It would even prohibit a tobacco company from sponsoring athletic, artistic, or other events under the registered brand name of a tobacco product, or from marketing non-tobacco products (such as clothing) or services that bear the registered brand name or logo of a tobacco product. The

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89 *See* discussion *infra*, text accompanying notes 205-58. Denial of a Writ of Certiorari by the Supreme Court in Cipollone, *supra* note 78, might be interpreted by some as a setback for the anti-smoking forces, since the Court could be seen as implicitly denying tort actions in light of the Federal Cigarette Labeling and Advertising Act. See, e.g., Mauro, *High court rejects cigarette suit; Anti-smoking forces say ruling just minor setback*, USA Today, January 13, 1987, p. 3A, c. 2.

90 *Consumer Union Report, supra* note 8, at 188 (1963). Several state legislatures had already considered that option at the time of this publication. *Id.*, at 191.

91 *See, e.g.*, Molotsky, *A.M.A. Expected to Call for Ban on Cigarette Ads*, New York Times, December 5, 1985, p. 1, c. 1; Sperling, *AMA to vote on ads, AIDS tests*, USA Today, December 10, 1985, p. D1.

92 *See, e.g.*, Kilpatrick, *A Cigarette Ad Smoke Screen*, Nation's Business, February 1986, p. 6.

93 H.R. 4972, 99th Cong., 2d Sess. (1986). It should be noted that Congressman Synar was an appropriate choice to introduce this Bill. His State had recently lost a fight through the courts regarding an advertising ban. Oklahoma Broadcasters Assn. v. Crisp, 636 F.Supp. 978 (W.D.Okla. 1986), decided May 30, 1986, permanently enjoined the State of Oklahoma from enforcing a law prohibiting alcohol advertising.

only promotional materials that would be permitted are point-of-purchase price information and a sign in a retail outlet stating that tobacco, cigarettes or cigars are sold on the premises.[94]

The justifications offered to support such a drastic regulatory action are the unnecessary deaths of over 300,000 Americans each year resulting from tobacco use, and the approximate $70 billion lost in 1985 to health care and lost productivity costs resulting from smoking related illness and premature death. The Synar Bill proposes that Congress has taken many steps to curtail these losses, to little avail, and that the next natural step is a total ban on advertising.[95]

Despite these powerful reasons, this Bill and its supporters ignited a bonfire of debate. While the AMA, the American Cancer Society[96], numerous legislators[97], and even a former Chairman of the FTC, Michael Pertschuk[98], spearheaded this movement, the tobacco industry was joined by many allies to

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[94] *Id.* The general rule and definitions from the Bill are as follows:

> SEC.3 TOBACCO SALES PROMOTION PROHIBITED.
> (a) GENERAL RULE. All consumer sales promotion of tobacco products by manufacturers, packers, distributors, importers, or sellers of such products in or affecting commerce is declared unlawful
>
> . . .
>
> SEC.5 DEFINITIONS
> As used in this Act:
> (1) The term "tobacco product" means —
> (A) cigarettes and little cigars as defined in section 3 of the Federal Cigarette Labeling and Advertising Act (15 U.S.C. 1332),
> (B) cigars as defined in section 5702 of the Internal Revenue Code of 1954,
> (C) pipe tobacco and loose rolling tobacco,
> (D) smokeless tobacco, including all finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral or nasal cavity, and
> (E) any other form of tobacco intended for human consumption.
> (2) The term "consumer sales promotion" means —
> (A) all radio and television commercials, newspaper and magazine advertisements, billboards, posters, signs, decals, matchbook advertising, point-of-purchase display material (except price information), and all other written or other material used for promoting the sale or consumption of tobacco products to consumers,
> (B) advertising promotion allowances,
> (C) premiums and samples,
> (D) sponsorships of athletic, artistic, or other events under the registered brand name of a tobacco product,
> (E) marketing of nontobacco products or services bearing the registered brand name or logo of a tobacco product, and
> (F) any other act or practice determined by the Federal Trade Commission to constitute unlawful consumer sales promotion pursuant to its authority under section 4 of this Act.
> In the case of a retail outlet, a sign stating that tobacco, cigarettes, or cigars are sold on the premises shall not be considered a consumer sales promotion.

[95] *Id.*, at Sec. 2.

[96] *A Constitutional Analysis of Proposals to Ban or Restrict Tobacco Product Advertising*, a legal memorandum prepared by the law firm, Covington & Burling (July 18, 1986).

[97] The Synar Bill was co-sponsored by Representatives Lowry, Swift, Nelson, Hansen, Stratton, Studds, and Atkins.

[98] Pertschuk, *Cigarette Ads: Lifting the Smoke Screen*, Wall St. J., April 23, 1986 (editorial page).

oppose the onslaught.

Attacking the unsupported suppositions inherent in the AMA's stated justifications, that removal of advertising would be accompanied by a conterminous reduction in tobacco consumption, and reacting more specifically to the support lent by Mr. Pertschuk, the Senior Vice President of The Tobacco Institute, William Kloepfer, remarked:

> Mr. Pertschuk's real gripe is with the product not the advertising. Yet his product "remedy" focusses strictly on the advertising ... Mr. Pertschuk would do well to come up with proof that a ban on tobacco advertising and promotion would cause any American either to stop smoking or not to start. In absence of that evidence, we are being asked to trade in the First Amendment for a pig in a poke.[99]

Columnist James J. Kilpatrick, revealing no pro-tobacco bias, voiced what may be a typical view of the journalists and the media:

> We have come a long way from *Chrestensen*, but the next year or two could produce a major test case on this whole uncertain issue ... For my own part, I hope that if the AMA's bill ever becomes law, the manufacturers and the press will win, and the AMA and its paternalistic friends will lose. Congress has no business telling a newspaper what it may and may not print in its advertising columns. I hold no brief, you will understand, for cigarette smoking as such. It is a dirty, smelly and unattractrive addiction, and if you accept the statistical evidence uncritically, the habit may do all the harm the surgeon general says it does. Even so, in a free society, the people must be free to do foolish things, so long as their conduct does not provably, demonstrably, significantly harm others. In the area of human behavior, government bans don't work. Surely we learned that much during the long dark night of Prohibition. Who wants to learn it anew?[100]

The issue quickly became one of First Amendment freedoms. While commercial speech had enjoyed protection under the Constitution for a decade[101], advertisers had been warned that it held an inferior position in the hierarchy of freedoms promised to other forms of speech.[102] As a consequence of this second-class constitutional status, the proposed ban raised an important question: whether the government can totally prohibit advertising of a legally sold product.

Almost as if it was planned, a decision was rendered by the United States Supreme Court just three weeks before hearings were scheduled to commence on the Synar Bill. This decision was read by many as an answer to that question. The timing could not have been more propitious for advocates of the ban.

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99 Kloepfer, *The Bid to Snuff Out Cigarette Ads*, in a Letter to the Editor, Wall St. J., April 30, 1986, p. 27, c. 1.

100 Kilpatrick, *A Cigarette Ad Smoke Screen*, Nation's Business, February 1986, p. 6. The Chrestensen reference is to Valentine v. Chrestensen, 316 U.S. 52 (1942), which was interpreted for 34 years to mean that commercial speech fell outside the umbrella of First Amendment protection.

101 Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Central Hudson Gas v. Public Service Commission of New York, 447 U.S. 557 (1980); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Zauderer v. Office of Disciplinary Counsel, 105 S.Ct. 2265 (1985).

102 "[W]e ... have afforded commercial speech a limited measure of protection, commensurate with its subordinate postion in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978). *See, also*, Central Hudson, *supra* note 101.

Puerto Rico Gambles, on an Ad Ban

Puerto Rico's Games of Chance Act of 1948[103] legalized certain forms of casino gambling, but forbade casinos from advertising or otherwise offering their facilities to the people of Puerto Rico. The Supreme Court was asked to assess the constitutionality of that Act in *Posadas de Puerto Rico Association v. Tourism Company*[104].

The appellant, here, was a hotel and casino which had repeatedly run afoul of the Act in question, and finally reacted to a multitude of fines by seeking a declaratory judgment on whether the Act violated appellant's commercial speech rights. The Superior Court of Puerto Rico determined that the Tourism Company, the administrative agency which enforced the Act, had been "capricious, arbitrary, erroneous and unreasonable" in its approach to enforcement, so it issued narrowing constructions of both the statute and an accompanying regulation.[105] Judgment was entered finding that appellant's constitutional rights had been violated by the Tourism Company's past actions, but upheld the facial constitutionality of the restrictions as modified by the court.[106] The United States Supreme Court, in an opinion authored by Chief Justice designate, William Rehnquist, agreed that with the construction of that lower court the Act and the implementing regulations do not facially violate the First Amendment guarantees of the Constitution.

In coming to this decision, Justice Rehnquist's analysis claims to follow the four-part test presented in *Central Hudson Gas v. Public Service Commission of New York*[107]:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more

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103 P.R. Laws Ann. Tit. 15, § 71, et seq. (1972).

104 106 S.Ct. 2968 (1986).

105 *Id.*, at 2973.

106 *Id.*, at 2974. The Act stated, "No gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." P. R. Laws Ann. Tit. 15, § 77 (1972). Prior construction of that prohibition, through Regulation 76a-1(7), provided:

> No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public of Puerto Rico. The advertising of our games of chance is hereby authorized through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company.

15 R. & R. P. R. § 76a-1(7) (1972). The Superior Court's narrowing construction of the Act added, "the only advertisement prohibited by law originally is that which is contracted with an advertising agency, for consideration, to attract the resident to bet at the dice, card, roulette and bingo tables." At the same time the court narrowed the Regulation, providing, in part, "Advertisements of the casinos in Puerto Rico are prohibited in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casino." By these modifications the court thereafter permitted publicity not only outside the Commonwealth but also within, so long as it was not *directed* to the residents of Puerto Rico.

107 *Supra* note 101.

extensive than is necessary to serve that interest.[108]

His application of this test to the facts in *Posadas* begins with an acknowledgment that advertising of gambling concerns a lawful activity, in Puerto Rico, and is not misleading. The next question, then, is whether there is a substantial governmental interest.

The ease with which the advertising ban passed this part of the test is disturbing. As Professor Philip B. Kurland, at the University of Chicago, states in his critical review of this case, "[T]he burden is on the government not merely to assert that it has a 'substantial' interest, but to demonstrate the nature of that interest by something more than *ipse dixit*."[109] The Tourism Company "proves" the substantiality of its interest by the naked assertion that:

> Excessive casino gambling among local residents ... would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.[110]

Mr. Justice Rehnquist, after quoting the above, responds, "we have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety and welfare of its citizens constitutes a 'substantial' governmental interest."[111] The implication of the remark seems to be that for a state (or Commonwealth) to pass muster on this first step, it need only promise that it is doing so for the "health, safety and welfare" of its citizens. That magic phrase is apparently synonymous with "substantial," in the eyes of our new Chief Justice. This is not a particularly difficult element of the test, obviously. Presumably, at this first step of analysis the state need not even show a logical relationship between the attempted suppression of speech and the claimed interest, as illustrated in Justice Rehnquist's example.

The next element of the *Central Hudson* test is that the regulation must "directly advance" that substantial interest. It is here that the connection between the state action and the substantial state interest must be proved. Unfortunately, there is a sad paucity of logic extant in this portion of the *Posadas* analysis. With no demonstration that prostitution, crime, and corruption are caused by casino gambling, with no demonstration that advertising promotes gambling rather than just choice of casino, and with no demonstration that advertising directed at the citizens of Puerto Rico will somehow differ in its outcome from advertising directed at tourists, Justice Rehnquist acquiesces to the Tourism Company's assertion that a ban on casino advertising directly aids the prevention of prostitution and a whole lexicon of other evils.[112] Responding to the question of whether the restriction directly advances the asserted interest, his

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108 *Id.*, at 566.

109 Kurland, *Posadas de Puerto Rico v. Tourism Company: 'Twas Strange, 'Twas Passing Strange, 'Twas Pitiful, 'Twas Wondrous Pitiful*, 1986 Sup. Ct. Rev. (in press).

110 106 S.Ct., at 2977.

111 *Id.*

112 Professor Kurland colorfully criticizes Justice Rehnquist's acceptance of the Tourism Company's list of problems as a substantial interest Reacting to that list he states:

> Now there is a parade of horribles to conjure with. And it may well be that casino gambling

complete analysis of the issue follows:

> In the instant case, the answer to this question is clearly "yes." The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that the advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.[113]

This parsimonious consideration of the third element of the *Central Hudson* test completely avoids asking whether those many stated ills that the legislature seeks to quash will in any way be injured by elimination of advertising. Certainly the inability of organized crime to advertise its alcoholic beverages during prohibition in no way seemed to arrest the St. Valentine's Day Massacre, nor did it effectively dissuade participants from a multitude of other criminal activities at that time. It seems unlikely that the Tourism Company could convincingly show such a connection, and without this showing there remains a gaping hole in the causal link for "direct advancement" of the government's asserted interest, but the Court simply overlooks this problem in the government's case.

With the same dexterity, Justice Rehnquist sidesteps the government's implicit argument that resulting crime will be any the less with only tourists as gambling patrons than it would be with the inclusion of Puerto Ricans. The legislature of the Commonwealth appears to have a very low regard for its citizens. Again, the causal link is broken for failure to make this necessary connection.

The only causal connection even mentioned by the Court is the relationship between advertising and gambling. Justice Rehnquist, however, sets this hurdle so low as to make it illusory. By pursuing its rights all the way to the Supreme Court, he says, indicates that appellant shares the legislature's view that advertising increases demand. By the single act of filing suit, the appellant has proved its opponent's case on this point. Of course, the only alternative is for the advertiser not to pursue its rights. I venture to say that there is no other cause of action in American law where mere institution of the suit, alone, proves the opponent's case in that suit.

If Justice Rehnquist's remark is taken as absolute, with no need to prove the entire causal chain, the "direct advancement" step of *Central Hudson* has been made self-proving. His logic, however, rests upon two unproved assumptions: 1) that advertising is effective to increase consumption of a product or service, and 2) that the advertiser's sole purpose for using advertising is to increase overall consumption, and not merely to compete for a larger share of the already consuming public or to reinforce loyalty to the advertiser's particular brand (casino). No evidence is proffered to substantiate these logical jumps. These are big, and I think unjustified, assumptions on the part of the Court; a Court not composed of advertising

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> brings all such evils with it. But if it does, why will it be less because the tables are dominated by Yanquis and Anglos? Is crime, prostitution, corruption, and the infiltration of organized crime, diminished by refusing to allow natives to patronize the casinos?

Kurland, *supra* note 109.

[113] *Supra* note 104, at 2977.

experts.

The fourth and final test of *Central Hudson* is one of overbreadth: Are the restrictions no more extensive than necessary? Appellant argued that the least restrictive alternative would not be to suppress advertising, but instead to promulgate *additional* speech discouraging patronage of casinos by Puerto Rican citizens.[114] This echos the recrimination by Mr. Justice Brandeis six decades ago: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[115]

The Court's retort, here, graciously moves aside that final barrier from the *Central Hudson* test of governmental propriety. Justice Rehnquist's majority opinion, responding to appellant's argument, explains:

> We reject this contention. We think it is up to the legislature to decide whether or not such a "counterspeech" policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct.[116]

Again in this last test the Court permits the legislature to act on assumptions in lieu of evidence, and it then gives deference to this legislative guesswork. No where is there evidence recited to support the decision that counter-advertising would be less effective than the abolition of commercial speech.[117]

The net effect of the Court's analysis, while portending to apply the scale it set forth just a few years earlier in *Central Hudson*, is to boldly undermine the threshold of impermissible governmental regulation.

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114 *Id.*

115 Whitney v. California, 274 U.S. 357, 377 (1927). *See*, Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 (1976). *Accord.*, Zauderer v. Office of Disciplinary Counsel, 105 S.Ct. 2265, 2282 (1985); Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 570-71 (1980); Bates v. State Bar of Arizona, 433 U.S. 350, 375 (1977).

116 *Supra* note 104, at 2978. This runs effectively contrary to Justice Rehnquist's own declaration in Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 80 (1983) (concurring opinion):

> The First Amendment, which was designed to prevent the Government from suppressing information, requires us "to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed.2d 346 (1976).

117 The Court cites as justification for this statement, a recent case concerning a similar restriction on alcoholic beverage advertising which arose in Mississippi:

> We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol would be effective. The state's concern is not that the public is unaware of the dangers of alcohol.... The concern instead is that advertising will unduly promote alcohol consumption despite known dangers.

Dunagin v. City of Oxford, 718 F.2d 738, 751 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). Like the present case, that decision of legislative justification was made in an evidentiary vacuum. And, like the present case it appears to turn on the legislature's desire to protect the public from making a bad, although informed, decision.

Under this new explication of the standard, the restrictions on casino advertising easily pass muster.[118]

This convolution of *Central Hudson* stands in stark contrast to a policy statement which appears in that prior case:

> We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy ... Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.[119]

No allegation of deception or unlawful activity was made in *Posadas*, yet the Court now finds the nonspeech goals baldly asserted by the Puerto Rican Legislature sufficient to justify abandonment of this policy.

An editorial that appeared shortly after this case in *Advertising Age* magazine, reflects, "Although Justice Rehnquist uses the Central Hudson tests in arriving at this decision, he dispatches them with ease so lacking in logic it must be an embarrassment to the other justices who joined him in the 5-4 opinion."[120]

The most disturbing portion of the *Posadas* opinion arose subsequent to its *Central Hudson* analysis. This was an attempt to respond to appellant's allegation[121] that the restrictions were constitutionally invalid under the decisions in *Carey v. Population Services International*[122] and *Bigelow v. Virginia*[123]. The response is particularly bothersome because it was unnecessary in light of the fact that the analysis had already upheld the constitutionality of the Puerto Rico legislation, and the opinion seems to go on with the intent of making an additional finding for the lone purpose of affecting later decisions by lower courts. It was almost as if to lay the foundation for Congressional action in the tobacco ad ban proposal.[124]

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[118] Professor Kurland, substantially in agreement with the preceding discussion, expresses similar outrage at the Court's analytical pretense:

> [T]here is no clear indication at all of any legislative purpose except so patently sophistical as to be incredible; there is no demonstration that the means, cutting off speech, will effectuate any of the hypothetical ends; and there is no showing that alternative means to these hypothetical ends were not available ... Except for a desire by Puerto Rico to play the mystical role of Robin Hood, stealing only from the unworthy, a highly doubtful constitutional classification, what was the state interest?

Kurland, *supra* note 109.

[119] *Supra* note 101, at 566 n. 9.

[120] Editorial, *Prohibition Again?*, Ad. Age, July 14, 1986, p. 17, c. 1.

[121] *Supra* note 104, at 2979.

[122] 431 U.S. 678 (1977). This was an action brought by contraception distributors, that challenged a New York statute prohibiting distribution of contraceptives to anyone under 16 years of age and banning advertising and display of contraceptives. The Court held that a state may not completely suppress the dissemination of concededly truthful information about entirely lawful activity even if that information is "commercial speech." *Id.* at 700.

[123] 421 U.S. 809 (1975). This case concerned the prohibition in Virginia of advertisements published in that State for an abortion referral service located in New York. The Court in this instance declared that Virginia had no substantial interest in regulating what Virginians may hear or read about activities in another state.

[124] The decision specifically mentions cigarettes in this additional finding:

Justice Rehnquist distinguishes those cases stating that the crucial difference is that *Carey* dealt with advertising contraceptives and *Bigelow* concerned advertising for an abortion clinic. He declares:

> In *Carey* and *Bigelow*, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling and *Carey* and *Bigelow* are hence inapposite.[125]

If taken as more than dicta[126] this statement would not only supplant the "lawful activity" test of *Central Hudson* with a "constitutionally protected activity" test, it would effectively overturn *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*[127], which found First Amendment speech protection to extend to advertising. The sale of virtually no product or service is protected by the Constitution, and the state has the power to ban almost any such activity, so it would have the lesser included power to ban advertising for nearly anything. Essentially, any constitutional protection for the advertising of a product would be derived vicariously from the protection afforded the underlying activity rather than from the First Amendment free speech provision.

In one quick motion Justice Rehnquist attempted to re-write the protection for commercial speech without discarding prior decisions. Rather than overturn *Central Hudson*, he subtlely re-formulated the four parts of the test, thereby blasting a path for the state through this former mine field and leaving the test potentially impotent. In his follow-through he made an equally skillful attempt to disarm *Virginia Pharmacy Board.*

To illuminate this decision, it is important to realize that at the time *Virginia Pharmacy Board* broke a longstanding denial of First Amendment protection for commercial speech[128], Justice Rehnquist was the sole dissenter. At that time he argued:

> The logical consequences of the Court's decision in this case, a decision which elevates commercial intercourse between a seller hawking his wares and a buyer seeking to strike a bargain to the same plane as has been previously reserved for the free marketplace of ideas, are

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> It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution ....

Supra note 104, at 2979.

125 *Id.*

126 When questioned about the impact of this declaration, at the National Conference of the Association for Education in Journalism and Mass Communication, August 4, 1986, the Senior Vice President for Government Relations of the American Advertising Federation, Wallace S. Snyder, responded that Rehnquist's remark was in the line of dicta, since it did not specifically overturn prior inconsistent rulings. He further argued that the statement was so incompatible with other cases that it would be unwise to read it literally.

127 *Supra* note 101. Justice Rehnquist, himself, warned in his dissent that it is improper to read Supreme Court decisions literally if the consequence is to overturn established precedent when the Court's opinion manifests an intent to preserve the precedent. *Id.* at 836.

128 *Supra* note 100.

> far reaching indeed. Under the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage. Now, however, such promotion is protected by the First Amendment *so long as it is not misleading or does not promote an illegal product or enterprise. In coming to this conclusion, the Court has overruled a legislative determination that such advertising should not be allowed ....*[129]

The predisposition of this Justice is readily observed in this statement, as is the fact that he understands the decision to extend to all legal activities, not just those that are constitutionally protected. His subsequent dissent in *Bates v. State Bar of Arizona*[130] reflects the same stance. Even as recently as 1985, in *Zauderer v. Office of Disciplinary Counsel*[131], a separate opinion by Justices O'Connor, Burger, and Rehnquist hints at similar sentiments. In the present decision, Justice Rehnquist has finally brought his view to the majority opinion, and he seems to have attempted a complete overhaul of precedent in a single decision.

It is unnecessary to ask, here, whether *Posadas* was *wrongly* decided, for I submit it is clear that falacious and insufficient testing under the *Central Hudson* standard, along with its accompanying declarations, makes it *poorly* decided. It is upon this weak and termite-laden foundation that the proponents of the tobacco ad ban rest their case. This decision was eagerly read by them as *carte blanche* to prohibit advertising of a legally sold or produced product or service, giving them an "all clear" signal from the Supreme Court to proceed with a ban of tobacco advertising.

TOWARD A BAN ON TOBACCO ADVERTISING

On July 18, 1986, a mere 17 days after *Posadas*, a Congressional subcommittee led by Representative Henry Waxman, of California, began hearings on the proposed ban.[132] Although the Reagan Administration's Surgeon General, C. Everett Koop, was an instigator and continuing catalyst for the ban, the White House took a definitive stand against such action. The Surgeon General was even prevented by his superiors from appearing at the first day of the hearings, and when he later appeared his remarks were qualified as "personal opinions and observations."[133] While many of the proponents, such as Bob Keeshan (television's Captain Kangaroo), the daughter of actor Yul Brynner, and the grandson of tobacco magnate R.J. Reynolds, focussed their remarks on the evils of the advertised product[134], it was at about the time of these hearings that the *legal* ramifications of an advertising ban entered public discussion.

Insert Fig. 3 About Here

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129 Virginia Pharmacy, *supra* note 101, at 781. (Emphasis added.)

130 *Supra* note 101, at 404.

131 *Supra* note 101, at 2294.

132 Colford, *Tobacco Ad Factions Poised for Hearings*, Advertising Age, July 14, 1986, p. 12, c. 1.

133 Colford, *White House Against Ban on Tobacco Ads*, Advertising Age, August 4, 1986, p. 1, c. 2. *See* Figure 3.

134 *Congress Asked to Ban All Cigarette Advertising*, Wisconsin State Journal, July 19, 1986, sect. 1, p. 4, c. 1.

As expected, supporters of the ban quickly rallied behind *Posadas* in their attempts to convince Congress and the public that a ban was legally obtainable. In preparation for the hearings, the American Heart Association prepared a press release outlining its position. It stated that, in accordance with the *Central Hudson* and *Posadas* analyses, the government has a substantial interest in banning tobacco advertising because:

1) More than 350,000 people die each year as a result of cigarette smoking; and
2) Cigarette smoking costs the nation $65 billion in health care costs, accidents and lost productivity.[135]

The argument then concludes that an ad ban would directly advance that government interest:

> The Court acknowledges, in both Central Hudson and Posadas, that advertising serves to increase the demand for the product being advertised.
>
> The Court said in both cases that the product manufacturers/ distributors would not contest a ban on advertising unless they believed it would increase sales. Cigarette advertising is clearly aimed at increasing sales of individual cigarette brands and cigarettes as a product. The Court also said that the legislature has the authority to make the determination whether or not advertising is intended to increase sales of a certain product.[136]

This remark clearly mirrors Justice Rehnquist's opinion in *Posadas*, though it over-states and over-simplifies even that unfounded decision.

A statement made before the Congressional subcommittee by Henry Paul Monaghan, a Professor of Law at Columbia University, was similar in its argument. With very little substantive explanation, Professor Monaghan declares:

> *Posadas* establishes that no first amendment right exists to advertise a harmful product ... In my opinion, the Court that decided *Posadas* would uphold a ban on cigarette advertising. Thus, I find utterly incomprehensible the assertion in the July 18th press release of the Association of National Advertisers, Inc. that, despite *Posadas*, a ban on cigarette advertising would "clearly violate" the constitution.[137]

On the other side of the dispute, American Association of Advertising Agencies (AAAA) president, Leonard S. Matthews, was quick to criticize the *Posadas* decision. He concluded that Justice Rehnquist's suggestion that the ability to prohibit the sale of a product necessarily carries with it the lesser authority to bar advertising of that product "would read the First Amendment right out of the Constitution as it pertains to advertising."[138] The AAAA executive vice president, John E. O'Toole, took the position that *Posadas* "arose in a unique factual situation," and could not therefore be expected to create fallout on the First

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135 American Heart Association, *The Myths and Realities of Banning Cigarette Advertising*, Media Bulletin on Government, Vol. 1, No. 2, August 1986, at p. 3.

136 *Id.* at 3-4.

137 *Statement of Henry Paul Monaghan*, Thomas M. Macioce Professor of Law, Columbia University, before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, United States House of Representatives, Hearing on Tobacco Advertising and Promotion, August 1, 1986.

138 American Association of Advertising Agencies, *American Association of Advertising Agencies Cites Strong Disagreement With Supreme Court Decision on Constitutional Protection for Ads*, July 2, 1986.

Amendment rights of advertisers generally.[139]

The tobacco industry, through its law firm, Covington and Burling, published a legal memorandum dated the first day of the Congressional hearings. The view of *Posadas* expounded in that document is reflected in the statement that follows:

> If one interprets the majority opinion in *Posadas* as deciding that the government has virtually unlimited power to suppress truthful speech concerning lawful products and services as long as there is no constitutionally protected right to purchase the products themselves, then almost all of the Court's commercial speech decisions since 1976 would now be open to reconsideration ... Nothing in the Court's prior decisions ever has suggested such a radical rule.[140]

The *Posadas* finding is distinguished, here, as being less comprehensive than the proposed tobacco ad ban. The restrictions in *Posadas* did not constitute a blanket ban, but merely forbade ads "addressed" to Puerto Rican residents. During oral argument in the Supreme Court it was admitted by legal counsel for Puerto Rico that casino advertising in a Spanish-language daily with 99 percent *local* circulation would be allowed if the advertising is addressed to tourists and not residents.[141]

New York University Law Professor Burt Neuborne, former legal director of the American Civil Liberties Union (ACLU), presented probably the most exhaustive and impressive explanation of the legal consequences of a tobacco advertising ban during the Congressional subcommittee hearings. His consideration of *Posadas* concluded:

> [U]nless one is prepared to read *Posadas* as *sub silentio* overruling of *Virginia Pharmacy*, it should be confined to those settings where a legislature conditions the decriminalization of a generally unlawful act upon a limitation on the ability to urge genuinely "vulnerable" persons to engage in it.[142]

Representing the ACLU at the hearings was Barry W. Lynn, its Legislative Counsel. Mr. Lynn stated the ACLU perspective on *Posadas* unequivocally:

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139 *Id.*

140 Covington and Burling, *A Constitutional Analysis of Proposals to Ban or Restrict Tobacco Product Advertising*, Legal Memorandum, July 18, 1986, at 23-4. The overall conclusion of this opinion was that the proposed ban on tobacco advertising would require much greater care than did the fact situation in Posadas:

> We are convinced ... that the Supreme Court's scrutiny of the AMA/ACS [tobacco ad ban] proposals would be far more exacting than was its scrutiny of the casino gambling advertising restrictions upheld in *Posadas*. The restrictions at issue in that case were so porous, so lacking in actual substantive effect, that the majority apparently considered it unnecessary to undertake a searching inquiry of the interests purportedly being served or the alternatives that may have been available ... We do not believe that the AMA/ACS proposals could survive the careful examination the proposal undoubtedly would prompt ... The AMA/ACS proposals are at once more extensive and more damaging to the First Amendment than the restrictions considered in *Posadas*.

Id. at 2

141 *Id.* at 5.

142 Statement of Burt Neuborne, Professor of Law, New York University, before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, United States House of Representatives, Hearing on Tobacco Advertising and Promotion, August 1, 1986.

> [T]he ACLU believe that *Posadas* was wrongly decided even on its narrow facts. However, *Posadas* is not actually a case about an advertising ban, so much as it is a "time, place, or manner" restriction case.[143]

The pro-ban advocates appear to have rested their legal justifications solely upon Justice Rehnquists' explication in *Posadas* of the *Central Hudson* test. This may be a weak foundation upon which to structure such a radical and controversial action. Not only is *Posadas* a questionable decision, its translation to the present fact situation is arguably tenuous. In addition, denied by such narrow analyses are the general legal premises from which the First Amendment was borne and through which it has matured. It is from this point that an analysis of the ban must begin.

Scorching Holes in the First Amendment

The prospect of a mandated abolition of a single class of communication, *in toto*, demands a litmus of constitutional viability beyond merely matching the general concept of that proposal to the finding of one isolated case. It must be viewed, rather, in the light of constitutional principles that pervade our system of protection for the communication of ideas and beliefs.

The Supreme Court has recited the broad philosophy of the First Amendment as assuring "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[144] In *Whitney v. California*[145], Justice Brandeis explained, "Those who won our independence believed ... that public discussion is a political duty; and that this should be a *fundamental* principle of the American government."[146] It is against this backdrop that a ban on tobacco advertising should be studied.

To ban the advertising of a particular product class is to give preferential treatment to other advertisers: to prefer one speaker over another. The First Amendment, however, forbids the government from regulating speech in such a way as to favor some viewpoints or ideas over others.[147] This is inherently inconsistent with the goal of engendering an "unfettered interchange of ideas," since open intercourse is impossible where one of the parties is silenced. Squelching the voices of tobacco manufacturers is an obvious example of this preferential selection.

In much the same way, the prospect of a truly open exchange of ideas is destined to defeat if some ideas are given preference over others. Consequently, the government has no power to restrict expression

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[143] Statement of Barry W. Lynn, Legislative Counsel to the American Civil Liberties Union, before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, United States House of Representatives, Hearing on Tobacco Advertising and Promotion, August 1, 1986. It should be noted, however, that this approach is not supported by the substance of the Court's opinion, inasmuch as it focussed solely on the test expounded in Central Hudson.

[144] Roth v. United States, 354 U.S. 476, 484 (1957).

[145] 274 U.S. 357 (1927).

[146] *Id.* at 375 (emphasis added). A restatement of this philosophical foundation by Judge Learned Hand appeared in United States v. Associated Press, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), explaining that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."

[147] City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

because of its ideas or content.[148] The proposed ban completely removes the messages of the tobacco industry from the public forum, lending preference to all other messages.

Although it was formerly thought that advertising messages do not contribute to the exchange of ideas and provide no information on matters of public importance[149], the Supreme Court has since acknowledged that advertising does indeed convey at least some modicum of information.[150] While cigarette advertisements admittedly offer fewer "facts" than many other messages, they do convey the availability of a brand, tar and nicotine content, and a wealth of information contained in the illustrations that are common in those ads, including a brand "image." Each of these components provides at least one message which would be removed from the "interchange of ideas" guaranteed by the Constitution.

Many or most of these messages may be thought by legislators to be of little social value, but it is not for them to predetermine which messages hold value for the potential recipients of those messages.[151] As Mr. Lynn stated in the subcommittee hearings, "If they smoke because they like the taste, the stimulation, or even the 'image', they certainly should have the choice to do so. They have a collateral right to learn through advertisements that others support such decisions."[152] But, what about situations where the information is potentially harmful to its recipient?

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148 Police Department v. Mosley, 408 U.S. 92, 95 (1972). The renowned First Amendment theorist, John Stuart Mill, once stated:

> If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind ... To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility.

J.S. Mill, *On Liberty* (1859).

149 Banzhaf v. FCC, 405 F.2d 1082, 1102 (D.C.Cir. 1968).

150 Virginia Pharmacy Board, *supra* note 101. Justice Stewart's comments offer other insight into the value of advertising messages:

> Although such expression may convey factual information relevant to social and individual decisionmaking, it is protected by the Constitution, whether or not it contains factual representations and even if it includes inaccurate assertions of fact ...
>
> Commercial price and product advertising differs markedly from ideological expression because it is confinced to the promotion of specific goods or services. The First Amendment protects the advertisement because of the "information of potential interest and value" conveyed, rather than because of any direct contribution to the interchange of ideas.

Id. at 779-80.

151 The Court in Lamont v. Postmaster General, 381 U.S. 301 (1965), held that citizens have a right to receive communist propaganda. This is so, said the Court, because it is up to the individual hearer, not the State, to evaluate the worth of speech. *See, also*, Procunier v. Martinez, 416 U.S. 396 (1974); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

152 *Supra* note 143. He says, further:

> We are offended, outranged, hurt, or frightened by a plethora of ideas and images. Many societies take a plebiscite about what bothers people and eliminate or censor that which puts allegedly dangerous or harmful ideas in people's heads. This country quite properly doesn't do things that way. Rather than have government suppress speech, we challenge and rebut it.

The thrust of the argument by those proposing the advertising ban, of course, must either be 1) that consumers, when presented with advertising messages about tobacco products, will make a poor decision, or 2) that the advertiser will assert some form of undue influence on those helpless consumers. As the result of that decision, a decision partially influenced by an advertiser's subjective beliefs about its product or its profit motive, the consumer risks various health hazards.

The Supreme Court has previously considered this question. Its determination, in *Metromedia v. City of San Diego*[153], was that "[a] State may not completely suppress the dissemination of truthful information about an entirely lawful activity merely because it is fearful of that information's effect upon ... its recipients."[154] And, in *Virginian Pharmacy Board* the Court stated, "It is precisely this kind of choice, between the dangers of suppressing information and the dangers of its misuse if it is fully available, that the First Amendment makes for us."[155] Both of these statements were made while considering advertising as a mode of communication within the favor of the First Amendment, and both reject the idea that *effects* of the communication which result from their *content* are sufficient basis for regulation.

Pro-ban advocates not only desire to prohibit messages based upon content, they hope to do so without proving that advertising actually causes or contributes to these abhorent effects.[156] Justice Marshall, writing for the Court in *Linmark Associates, Inc. v. Township of Willingboro*[157], expressly denied that a "plausible" tendency of commercial speech to induce its recipients into detrimental or irrational acts was a sufficient basis for suppression.[158]

During his testimony, Professor Neuborne concluded:

> Starkly put, the proposed ban is a vote of "no confidence" in the capacity of ordinary Americans to judge for themselves how to react to tobacco advertising. Such an elitist approach, which treats Americans as the incompetent wards of a benevolent State who can't be trusted to evaluate speech for themselves, is wholly antithetical to the faith in human reason that underlies our political and economic system.[159]

A focus on the possibility of bad effects of advertising, then, directly conflicts with the Constitutional premise of an "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[160] The people have no way of knowing what changes they want if they are kept ignorant of the options. Of course, the social changes incurred through advertising are primarily economic in nature. However, in a concurring opinion in *Central Hudson*, Justice Blackmun declared:

I do not agree ... that the Court's four-part test is the proper one to be applied when a State

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153 453 U.S. 490 (1981).

154 *Id.* at 505.

155 *Supra* note 101, at 770.

156 *Infra*, text accompanying notes 170-97.

157 431 U.S. 85 (1977).

158 *Id.* at 92.

159 *Supra* note 142.

160 *Supra* note 144.

seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.[161]

For nearly half a century advertising has been viewed by the judiciary as the bastard child of "legitimate" speech, holding the speech proposing a commercial or economic transaction as somehow less honorable than speech proposing a social or political transaction. Indeed, in this day of economic embargos and boycotts of products made by companies with investments in racist countries, it seems that political and commercial speech are so inextricably entwined as to make such a distinction artificial and nonsensical.

The simple fact is, the American citizen's voice in his or her society and government is no longer relegated to a ballot box on Election Day. We have become an economically-based society in which we vote daily, through choices of products and services. As the majority casts its purchase-vote for computers or videotape recorders, it is choosing, vicariously, to support research and development in the fields of electronics and communications technology just as surely as it would if it elected political representatives dedicated to channeling government resources into the development of electronics and communications technologies for use in defense or in space exploration. It is likewise choosing, through those votes, the direction of this society's development as a whole and the industries which will employ us in the present and future. When consumers opt to purchase lesser quantities of oil and gasoline, they vote intentionally or incidentally to conserve the nation's energy resources and to decrease the country's dependence upon imports from other nations; *they take an active role in the determination of United States foreign policy*. Professor Neuborne remarks, "Individuals do not lose their capacity for rational thought and their right to personal autonomy simply because they are exercising economic as opposed to political choices."[162]

The concept of individual autonomy is one that resides at the core of the First Amendment.[163] Such autonomy or intellectual self-fulfillment depends upon the availability of decisional information, be it commercial or otherwise.[164] There is a marked difference, however, between true autonomy and that which is merely perceived by the individual as constituting autonomy. The most insidious breed of government regulation is that which not only infringes upon that autonomy, but leaves the individual with a false sense that nothing has impinged upon that freedom.[165] An attempt by a government to modify the behavior of its citizens by information control is an offense to personal autonomy much greater than the direct

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161 *Supra* note 101, at 573.

162 *Supra* note 142. Professor Neuborne touches upon the value of economic speech when he says that "supporters of the ban seriously undervalue the significance of commercial speech in our society. From a strictly economic standpoint, the optimal allocation of goods and services in a market economy is dependent on a free flow of information about those goods and services."

163 Note, *The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements*, 85 Colum. L. Rev. 632, 647 (1985). *See, also*, Scanlon, *A Theory of Freedom of Expression*, 1972 J. Phil. & Pub. Aff. 204.

164 Note, *Television Counteradvertising: "And Now a Word Against Our Sponsor ..."* 3 Rutgers-Camden L. J. 516, 517 (1972). *See, generally*, Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429 (1971).

165 *Supra* note 142.

prohibition of the target activity; it is nothing less than a covert form of mind control![166] The ban presently at issue is intended as the *quid pro quo* of forbidding the sale of tobacco. By removing its source from the public arena, there will be no one left arguing the pleasures of smoking, and the sale of tobacco will diminish. This is an unacceptable technique in a true democracy, and one which could quickly compound its offenses.

AN AD BAN UNDER CENTRAL HUDSON

Although the fallacies of the *Posadas* decision, the weaknesses in its application in securing an ad ban, and various Constitutional principles yet stand as barriers before the pro-ban advocates, the most substantial blockade is to be found in the four-part *Central Hudson* test. Despite a certain anemia in this test since its emasculation by Justice Rehnquist in *Posadas*, this test still holds some promise for triumph by the defenders of the First Amendment. It would be a significant task for the Court to gloss over this test when confronted with the highly visible and controversial issue of advertising for tobacco products, unlike the promotion of casinos in a mere commonwealth under the influence of the United States.

Legality

The first part of the test asks whether the ad concerns a lawful activity. Clearly in the case of tobacco advertising it does. However, it also asks whether the ad is misleading. There is some argument in this regard, but it is doubtful that a court will uphold a ban based upon this question. It requires that the fact-finder declare all tobacco advertising, even that not yet created, to be deceptive. This requires a determination that it is *impossible* to create an ad for a tobacco product that is not deceptive. It would be difficult to find an advertisement such as those presently promoting *Carlton* cigarettes to be deceptive, since they include no illustrations and state no more than "If You Smoke, Please Smoke Carlton." Additionally, the mandated Surgeon General's Warning effectively estops any charge that such advertisements are deceptive because of their failure to disclose material facts.

Substantial Interest

The test's second part questions whether a substantial governmental interest exists. The answer to this question is essentially indisputable. Indeed, the large number of lives and monetary values at issue constitute a substantial interest.

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166 This is reminiscent of the scare over the use of "subliminal" messages, communicated directly to the subconscious of its recipients without their being aware of having received a message, which arose in the late 1950s and again in the early 1970s. Such messages, it was feared, would influence the recipient's behavior in much the same manner as hypnotism. An advertising ban, as proposed, is likewise intended to alter behavior without awareness, but it is a much more realistic threat than "subliminal" seductions, since the latter have never been shown capable of affecting behavior. *See*, Richards and Zakia, *Pictures: An Advertiser's Expressway Through FTC Regulation*, 16 Ga. L. Rev. 77, 118-32 (1981).

Advancement of Government Interest

The third part of the test, whether the regulation will directly advance that governmental interest, presents major headaches for proponents of the ban, unless the courts are willing to narrowly adhere to the vacuous interpretation of this test applied in *Posadas*.[167] There is substantially more at stake and greater probable resistance with tobacco advertising than with casinos, requiring greater care for the application of this stage of the test. It is not enough to show that there is a substantial interest in the health and welfare of the people. The government would need to show a causal link between advertising and the 350,000 deaths per year. It must be proved, in essence, that tobacco advertising is the weapon, or at least one of the weapons, used for this heinous crime. The testimony of pro-ban advocates at the subcommittee hearings all concentrated on highlighting the great evils of cigarettes. No matter how great those ills, however, they do not justify an advertising ban if it can not be shown that advertising contributes to this problem.

To take the position, as Justice Rehnquist did in *Posadas*, that advertising must increase the number of smokers or the tobacco companies would not challenge the regulation, is pretzel-logic. This makes the very large assumptions, based neither in law nor fact: 1) That speakers will never pursue their rights on principle, 2) that advertising is effective in attracting consumers, and 3) that the only intent of advertising is to increase industry sales, without regard to brands. The first of these fallacies speaks for itself but the nature of advertising deserves further discussion.

It is the Christmas wish of every advertiser to isolate an advertising approach that will herd consumers like cattle to purchase a product or service, but any such expectation circumvents reality. Though it was once thought that the mass media could have extremely powerful effects on the attitudes, beliefs, or behavior of the receivers of a message[168], it is now known by communication researchers that mediated messages, such as advertising, are very limited in their effects.[169] Thousands of products and services fail every year in spite of their advertising.

Available evidence does not support the assertion that tobacco advertising contributes to consumption. As early as 1962 Italy instituted a ban on tobacco advertising[170], and was quickly followed by several other countries. There are presently about 18 countries which have total bans on tobacco

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167 Historically, this question has presented problems for those pursuing regulation of commercial speech. In Central Hudson, *supra* note 101 at 569, the link between the advertiser's electricity rates and its electric energy advertising was too speculative to support a prohibition, in Linmark Associates, *supra* note 157 at 95, the city was unable to prove that the presence of "for sale" signs would cause panic selling of real estate, and in Virginia Pharmacy, *supra* note 101 at 769, there was no proof that advertising by pharmacists would result in a lowering of professional standards.

168 This was known as a "hypodermic" or "bullet" effect. This theory developed at about the time of World Wars I and II, and grew out of concern over political propaganda which proliferated at that time. *See, e.g.*, Becker, McCombs and McLeod, *The Develpment of Political Cognitions, in Political Communications: Issues and Strategies for Research* 21 (S. Chaffee ed. 1975). *See, also*, M. McCombs & L. Becker, *Using Mass Communication Theory* 41 (1979).

169 *Id.*

170 *Consumers Union Report, supra* note 8, at 188.

advertising, most of which are communist-bloc countries.[171] These bans provide unique opportunities to view, in laboratory-like conditions, the actual effects of such a ban. Several studies of this phenomena have, in fact, been conducted.

In 1975 a study was presented at the Third World Conference on Smoking and Health in New York City.[172] That study statistically analyzed percapita tobacco consumption as a function of advertising bans in ten different countries. This researcher determined that *none* of the countries had measurably succeeded in its quest for reduced smoking by its citizens.

A collection of data from official and trade organizations was recently reported by J.J. Boddewyn, a Professor of Marketing at Baruch College, which analyzes the effects of advertising bans in 16 countries.[173] Professor Boddewyn found overall cigarette consumption in Communist-bloc countries has increased by 30 percent since 1970, despite the absence of advertising.[174] Not only has this absence not reduced consumption, the use of cigarettes has actually increased! The post-ban consumption in countries with free-market economies reflected trends that existed prior to the ban.[175] In other words, advertising appears to have had no impact whatsoever on overall consumption in these countries.

Another study, produced a few years ago by a federation of advertising industry trade associations in West Germany looked at data from 14 countries. That study reported, "Every country in the world that has tried to reduce smoking by restricting tobacco advertisements has been unsuccessful."[176]

Despite its early entry into the ad-ban effort, per-capita consumption of cigarettes in Italy increased by 31 percent between 1965 and 1971, and by another 36 percent between 1971 and 1982.[177] The government of Norway, frequently applauded by anti-smokers for adopting the most severe of all advertising restrictions, now concedes that their ban has had little or no impact on cigarette smoking.[178] There appears to be *no* study that refutes these findings.[179]

Studies of the impacts of the 1971 broadcast advertising ban on tobacco products are also available. Eugene Levitt, Director of Psychology at the Indiana University Medical School, found that consumption

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171 Information provided by the World Health Organization, January 1986. The countries listed at that time were Norway, Finland, Italy, Iceland, Mozambique, Algeria, Jordan, Sudan, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, Romania, Soviet Union, Yugoslavia, Singapore, and French Polynesia.

172 Hamilton, *The Effect of Cigarette Advertising Bans on Cigarette Consumption, in Proceedings of the Third World Conference on Smoking and Health*, Vol. II, p. 2 (1975).

173 J.J. Boddewyn, *Tobacco Advertising Bans and Consumption in 16 Countries* (International Advertising Associations 1986).

174 This study covered consumption in those countries from 1970 to 1984.

175 This studied the growth rate from the date of the ban in each country until 1984.

176 Reported in M.J. Waterson, *Advertising and Cigarette Consumption*, at introduction (The Advertising Association 1984).

177 *Supra* note 138.

178 *The Bid to Snuff Out Cigarette Ads*, Letter to the Editor from William Kloepfer, Jr., Senior Vice President of The Tobacco Institute, Wall St. J., April 30, 1986, p. 27, c. 1.

179 Even the American Heart Association acknowledges this point in a recent press release. American Heart Association, *The Myths and Realities of Banning Cigarette Advertising*, Media Bulletin on Government, August 1986.

of cigarettes *increased* during the first two years following that ban, and then fell slightly but remained at a level above that which existed when the ban went into effect.[180] He also noted that other countries instituting similar bans experienced growth of per-capita consumption ranging from 17 to 25 percent. Some studies have suggested that the ban in this country may have increased consumption because withdrawal of cigarette ads from radio and television caused a concomitant withdrawal of anti-smoking commercials, since the Fairness Doctrine[181] no longer provided anti-smoking advocates with free air time.[182]

A study of cigarette consumption versus volume of tobacco advertising in the United Kingdom was conducted by the Metra Consulting Group.[183] This study looked for an association between the amount of advertising used and consumer purchasing behavior during the period from 1958 to 1978, using econometric analysis. The conclusion was that advertising volume had no significant effect on sales volume.

In 1986, Avery Abernethy and Jesse Teel, at the University of South Carolina, published a study of tobacco consumption in the United States over the period from 1949 to 1981.[184] This research looked at the effects of several historical incidents on the consumption of tobacco, including the first warning on cigarette packages, the revised warning that was adopted in 1970, the entry of broadcast counter-advertising from 1968 to 1970, the introduction of warnings into print advertising, and the broadcast ban.[185] Their conclusions state:

> Thus the banning of broadcast advertising was probably ineffective, and perhaps even counterproductive, considering the ad ban was coupled with a limitation of counterads in the broadcast meda ... The health warnings placed on cigarette packs, in print ads and the counterads on broadcast media all contributed to a decline in tobacco consumption. These regulatory actions apparently changed consumption behavior ... Informing consumers of the health effects of harmful products seems to be a much more effective means of limiting consumption than the restriction of advertising.[186]

Study after study reveals the same result: tobacco advertising has no measurable effect upon tobacco consumption, and removal of that advertising may even hinder attempts to reduce its consumption.

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180 E. Levitt, *The T.V. Cigarette Ad Ban: Unexpected Fallout* (World Smoking and Health 1977).

181 *Supra* note 41.

182 *See, e.g.*, Hamilton, *The Demand for Cigarettes: Advertising, The Health Scare, and the Cigarette Advertising Ban*, 54 Rev. of Economics and Statistics 406, 409 (1972); Warner, *The Effects of the Anti-Smoking Campaign on Cigarette Consumption*, 67 Amer. J. of Public Health 648 (1977). The FTC, however, believes that these studies suffer from several deficiencies, and suggests that the anti-smoking commercials were relatively ineffective at reducing cigarette consumption. Federal Trade Commission, *Staff Report on Consumer Responses to Cigarette Health Information* 3-7 (1979).

183 Boddewyn, *Tobacco Advertising Bans and Consumption in 16 Countries* 4 (International Advertising Association 1986).

184 Abernethy and Teel, *Advertising Regulation's Effect Upon Demand for Cigarettes*, 15(4) J. of Advertising 51 (1986).

185 While this is perhaps the most comprehensive study to date it is not without its flaws, the most important of which is probably the fact that every regulatory action considered occurred in just a seven year span of time, and it is conceivable that even an effective action may not realized results immediately. Consequently, an effect of the first warning on cigarette packages may not be measurable until the time of the broadcast advertising ban, confounding interpretation of the results of this study.

186 *Id.* at 55.

Professor Reinhold Bergler, head of the Institute of Psychology at Bonn University, claims:

> All available data point to one conclusion and one conclusion only. Imposing a ban on cigarette advertising irrespective of the media forms to which it applies and irrespective of the time when it comes into force — is not an effective way of slowing down the rise in cigarette consumption, still less a means of producing a decline in consumption. The available evidence tends to suggest that any deceleration in the growth of consumption is more likely to be due to changing public awareness in matters of health, and possibly also to the effects of an anti-smoking campaign.[187]

It seems, then, that advertising is not really a factor in the creation of new smokers. Professor Michael Schudson, in his recent book about the impacts of advertising on society, calls attention to the fact that tens of thousands of women began smoking cigarettes in the 1920s, before even a single advertisement was directed at them.[188] He states that "consumer changes are rarely wrought by advertising. Advertising followed rather than led the spread of cigarette usage and it was the convenience and democracy of the cigarette, coupled with specific, new opportunities for its use, that brought the cigarette into American life."[189]

Research studies support this contention, suggesting that the influence of advertising on smoking initiation is inconsequential.[190] In fact, many studies show that it is parents, siblings, and peer groups that play a central role in the adoption of the smoking habit.[191]

If, as all of these studies indicate, advertising does not attract new consumers to begin smoking, it may at first blush seem that all of the expense of advertising is for naught. This is precisely what Justice Rehnquist suggests in his *Posadas* deliberation. Quite to the contrary, advertising serves a purpose other than converting new consumers to a product: it converts pre-existing consumers from one brand of that product to another brand.

This, in fact, is the function claimed by the advertising and tobacco industries to be the great utility of tobacco advertising. Anne Browder, Assistant to the President of the Tobacco Institute, says, "Advertising doesn't create smokers, it creates brand loyalty."[192] John O'Toole, AAAA Executive Vice

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[187] R. Bergler, *Advertising and Cigarette Smoking: A Psychological Study* (1981).

[188] M. Schudson, *Advertising, The Uneasy Persuasion: Its Dubious Impact on American Society* 183 (1984).

[189] *Id.* at 179.

[190] Goldberg and Stoll, *Teenage Smoking in New Haven: Results of an In-depth Survey*, 33(10) Conn. Med 629 (1969); Canadian Council on Smoking and Health, *Psycho-Social Aspects of Cigarette-Smoking, 1972-76* (1976).

[191] *See, e.g.*, Biglan and Lichtenstein, *A Behavior-Analytic Approach to Smoking Acquisition: Some Recent Findings*, 14(3) J. of Applied Social Psychology 207 (1984); Chassin, Presson, Sherman, Corty, & Olshavsky, *Predicting the Onset of Cigarette Smoking in Adolescents: A Longitudinal Study*, 14(3) J. of Applied Social Psychology 224 (1984; Spielberger, Jacobs, Crane, & Russell, *On the Relationship Between Family Smoking Habits and the Smoking Behavior of College Students*, 32 International Rev. of Applied Psychology 53 (1983). Dr. Mortimer Lipsett, Director of the National Institute of Child Health and Human Development, agrees that "[t]he most forceful determinants of smoking are parents, peers, and older siblings." Testimony before the Subcommittee on Health and Environment, United States House of Representatives, Committee on Energy and Commerce, *Smoking Prevention Education Act: Hearings on H.R. 1824*, 98th Cong., 1st Sess., 53 (1983).

[192] *AMA Considers Attack on Ads for Cigarets*, Milwaukee J., December 10, 1985, p. 6.

President, testified at the subcommittee hearings:

> Do I mean to tell you that the tobacco industry isn't advertising in order to expand or at least maintain its use base? No. I mean to tell you that the tobacco industry isn't advertising at all. Individual brands are advertising in a highly competitive effort to expand or maintain their user bases at the expense of one another.[193]

Not only those with a vested interest in tobacco advertising, however, acknowledge this utility. In 1979 the United States Surgeon General publicly agreed that "the major action of cigarette advertising now seems to be to shift brand preferences, to alter market share for a particular brand."[194] Judge Skelly Wright, in Capital Broadcasting, remarked, "While cigarette advertising is apparently quite effective in inducing brand loyalty, it seems to have little impact on whether people in fact smoke."[195]

The fact that a firm advertises, or is willing to fight for the right to continue advertising does not mean that new smokers are being created by the seduction of advertising. A single company is not as concerned about continued growth of the industry as it is about growth of its *own* volume. Whether that growth derives from industry expansion or market share is relatively inconsequential. The *Posadas* analysis would suggest that once an industry reaches its growth potential, and is no longer bringing in new consumers, advertising will cease because it is no longer needed. In truth, advertising at that time becomes crucial to the survival of a company, because the company's vitality in this mature market relies upon maintaining or expanding the number of consumers from within that fixed pool of users.[196] Research supports this contention. Abernethy and Teel, reporting their study, state: "It seems that cigarette advertising primarily affects the market share of individual brands rather than aggregate consumption.[197]

The American Heart Association counters that even if the brand-switching purpose of advertising is conceded, the advertising must still be used to encourage existing users to maintain their habit.[198] No evidence is available, however, supporting this effect of the advertising. As shown by the research discussed above, indications are to the contrary, and the extremely addictive nature of cigarettes[199] probably makes "encouragement" to maintain the habit unnecessary.

There is little chance that a ban could pass muster under this third part of the *Central Hudson* test. *Posadas* took a simplistic approach to this question, but the mountain of evidence ready and waiting to disprove the erroneous assumptions made in that case and the "direct advancement" of the governmental

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193 Statement of John E. O'Toole, Director of the Washington Office of the American Association of Advertising Agencies, before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, United States House of Representatives, Hearing on Tobacco Advertising and Promotion, August 1, 1986.

194 Surgeon General, *Smoking and Health: A Report of the Surgeon General* 18-23 (1979).

195 *Supra* note 49, at 588.

196 A single share point in the cigarette market is worth approximately $200 million in factory sales. *Supra* note 193.

197 *Supra* note 184.

198 *Supra* note 179.

199 Federal Trade Commission, *Staff Report on the Cigarette Advertising Investigation* 1-46 (1981).

interest, makes it unlikely that a court will unquestioningly assume the *Posadas* approach.

Overbreadth

Even if the ban can somehow squeeze past judicial scrutiny on that third part of the test, one hurdle remains. The final step of this test requires that the regulatory action be no more restrictive than necessary to realize advancement of the substantial governmental interest.[200] Where a less restrictive alternative is available, the proposed action must be rejected by the courts.

Counter-advertising and more effective health warnings represent more amenable approaches than an outright ban. The research findings advanced by Abernethy and Teel[201] indicate that these alternatives are probably more effective, anyway. These options, unlike the ban, are inoffensive to the Constitution, because they prescribe *more* speech, not *less*.[202] To argue, as Justice Rehnquist did in *Posadas*[203], that these added-speech measures will be ineffective, requiring the legislature to opt for a ban, is logically inconsistent. To argue that a ban for advertising will directly advance the governmental interest is to argue that advertising has powerful influences on consumers. *If the seller's message has such a profound concussion, so should effectively composed advertising that argues its counter-point*! In the same manner the Surgeon General's warnings, being essentially counter-advertisements within the advertisements, might be expected to be quite effective if designed for maximum persuasive value.

During the subcommittee hearings, Gilbert Weil, General Counsel for the Association of National Advertisers, asked Congress to table any action on the ban until it can guage the effect of the new tougher health warnings.[204] Once again, the salient question is: *Will the new warnings be effective?* If the newly mandated warnings are sufficiently efficacious, the constitutionally unpalatable ban of advertising could be less enticing to its advocates. However, if these warnings show little or no improvement over the former warnings, this impotency can be expected to serve as ammunition for pro-ban advocates. Obviously, they will say, everything short of a ban has been done, so a less restrictive alternative will not work. Unfortunately, everything possible has not been done, because many of the fundamental principles of

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200 *Supra* note 108.

201 *Supra* note 186.

202 *Supra* note 115.

203 *Supra* note 116.

204 Colford, *White House Against Ban on Tobacco Ads*, Advertising Age, August 14, 1986, p. 1, c. 4. Professor Neuborne, in his testimony, made a similar suggestion:

> The counterspeech could take at least three forms. First, the government could mount an intensive campaign similar to the Armed Forces recruitment advertising campaigns. Second, Congress could reaffirm the fairness doctrine while repealing the self-defeating ban on tobacco advertising on radio and television. Finally, Congress could fine-tune its advertising warning requirements. Before taking such steps, however, Congress certainly should give the labelling requirements it imposed on cigarette advertising in 1985, and on smokeless tobacco advertising earlier this year, an opportunity to work their intended effect.

Supra note 142.

communications theory have been ignored in the design of these new health warnings. If the ban is to be avoided without forfeiting the altruistic goals of the Surgeon General and his collaborators, those warnings must be honed to their peak of persuasive potential.

WHY THE NEW WARNINGS IN CIGARETTE ADVERTISING WON'T WORK ... MAYBE

Upon reviewing the success of the prior Surgeon General's warnings in cigarette advertising and labeling, a few years ago, the Commission staff discovered that most Americans, especially smokers, are unaware of the risks associated with smoking, and those that do know of the hazards have insufficient information about the specifics and how it applies to them.[205] As a direct consequence of those findings, proposals were made by the FTC staff and the present rotational series of four warnings[206] were eventually adopted by Congress, for inclusion in all cigarette advertising. Those proposals were based upon some established principles of advertising theory, and were aimed at alleviating certain probable deficiencies inherent in the design of the old warning.

Problems Addressed by the New Approach

The stated philosophy behind this measure is basically two-fold.[207] First, is an effort to avert advertising "wearout"[208], where the repetition of a message can reach an asymptote in the ability of consumers to recall the message and will eventually result in "habituation" that causes a dramatic *decline* in message recall.

Advertising Wearout

There is undoubtedly no other advertising message so frequently published as the Surgeon General's warning, making the threat of wearout more important to this message than to any other. The magnitude of threat depends upon the number of repetitions of the warning required to affect wearout. Herbert E.

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205 The FTC staff found:

> While most Americans are generally aware that smoking is hazardous, some consumers, especially smokers, do not know this basic fact. However, even if it is assumed that *every* consumer is aware that smoking is hazardous, the evidence indicates that many consumers do not have enough information about the health risks of smoking in order to know how dangerous smoking is, i.e., what is the nature and extent of the health risk of smoking. Many consumers also do not know whether the general health risks of smoking have any *personal relevance* to themselves or whether they are among those groups of people who may be uniquely vulnerable to thse health hazards.

Federal Trade Commission, *Staff Report on the Cigarette Advertising Investigation* 9 (1981).

206 *Supra* note 56.

207 *Supra* note 205.

208 Greenberg and Suttoni, *Television Commercial Wearout*, 13 J. of Advertising Research 47(1973).

Krugman[209], a highly regarded consumer researcher, argues only three exposures to an advertisement are necessary for maximum impact and that further repetition is redundant. For a warning which appears in every cigarette ad and on every package, this supposed maximum is reached at the very latest upon buying a third packet of cigarettes. In reality, smokers are probably exposed to this governmental message thousands of times each year.

One group of behavioral researchers conducted two studies to examine the impact of high levels of print ad repetition on brand name recall.[210] Their hope was to replicate wearout results in a controlled experiment, since prior observations of this phenomenon had been only under field conditions. They discovered that repetition of ads three times as often as needed for 100% learning caused wearout when their memory was tested 28 days later.[211] Seven exposures were required for maximum recall of the brand name (contrary to Krugman's hypothesized three), but after 21 exposures memory for the brand name *decreased*.

The second experiment conducted by these researchers revealed that after subjects reach repetition twice that needed to learn the content of the message they become inattentive to the ad, and over time forget it.[212] Thereafter, when the viewers spot the message they do not pay attention to it because they perceive it as familiar even though they have no recollection of its specific content. Smokers, then, may be aware that the message is on the cigarette package and in its advertising, but they quickly tire of reading it and eventually forget what it says.

By changing the warnings in cigarette ads, even on a rotational basis, the consumer will be presented with a new message every three months to which he or she, in theory, must habituate anew. It is for this reason that the FTC proposed the recent change from a single warning to four separate warnings. This theory did not suggest what the *content* of the new messages should be, it only required that they be sufficiently dissimilar so that consumers would notice the difference and pay attention to them.

Personal Salience

The second problem addressed by this new approach is the "personal salience" of the message to the consumer. That is, do pregnant women realize their fetus can suffer from their habit? Do chronic cardiac sufferers understand smoking is not only adverse to their lungs but to their heart as well? The specific nature of these new warnings is aimed at highlighting facts that may make these risks more important to consumers. This gives consumers help in assessing the application of the message to their own needs, in

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209 Krugman, *Why Three Exposures May Be Enough*, 12 J. of Advertising Research 11 (1972).

210 Craig, Sternthal, and Leavitt, *Advertising Wearout: An Experimental Analysis*, 13 J. of Marketing Research 365 (1976).

211 They showed 180 Ohio State undergraduates slides of 12 print ads for 5 seconds each with three levels of repetition. The lowest level, "100% learning," was operationalized as "the point where the learning curve leveled off in the immediate recall condition," found to be 7 repetitions under these conditions, rather than Krugman's 3. Subjects were also shown 200% and 300% repetition levels, and recall was tested at 0, 1, 7, and 28 days.

212 Controlling for inattention, in the second experiment, the wearout effect disappeared.

this instance the rudimentary psychological needs of self-preservation and parental nurturing.[213] Several studies have shown that perceived message utility can effect consumer attention; the more useful consumers believe the message to be to them, the greater probability they will pay attention to it.[214] The new warnings, then, take four different approaches, in hopes that they will grab the attention of at least four different groups of smokers.

Though Congress appears to have vitiated some of the adverse eventualities of wearout and salience, there remain serious barriers to communication of or persuasion by the Surgeon General's warnings. This new campaign does not account for interference from an interaction between the primary persuasive message of a given ad (the advertiser's message) and the secondary persuasive message (the health warning). The warning has been analyzed by the government as if it were an advertisement standing alone, without lending serious scrutiny to the fact that it is a single element of many advertisements, and so must compete with the advertiser's message for reader attention. This factor might be so confounding as to make wearout and salience virtually irrelevant to effectively communicating the health risk information.

Persuasion Interference Effects in Cigarette Advertising

The two problems discussed above were emphasized by the FTC in its argument for new warnings. These were founded on four factors enumerated by the Commission: 1) the warning is overexposed, 2) it is no longer novel, 3) its abstract nature makes it difficult to remember, and 4) it is not likely to be perceived as personally relevant.[215] The discussion below will consider some additional theories that raise doubts about the sufficiency of the FTC's considerations. This is not intended to be an exclusive list of pertinent theories, nor is it to be an exhaustive review of each. These are only offered to point to some additionally plausible barriers to efficacy of the warnings, apparently overlooked by the Commission. The FTC's own data reveals that less than 3% of adults exposed to cigarette ads ever read the message[216], so the obstacles are enormous, and all possible factors must be evaluated.

The Statement of Basis for the original FTC rule on cigarette labeling[217] offered some observations on ad content. These remarks assert two legal bases for a finding of deception, implicit falsity and explicit falsity. They state:

> One examination of cigarette advertising indicates that two elements predominate: one, portrayal of the desirability of smoking; and two, assurance about the safety of cigarettes or

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213 *See, e.g.*, Fowles, *Advertising's Fifteen Basic Appeals*, Et cetera 273 (Fall 1982); A.H. Maslow, *Toward a Psychology of Being* (1962); Maslow, *A Theory of Human Motivation*, 50 Psych. Rev. 370 (1943).

214 Rosen, *Post-Decision Affinity for Incompatible Information*, 63 J. of Abnormal and Social Psychology 188(1961); Maccoby, Romney, Adams, and Maccoby, *Critical Periods in Seeking and Accepting Information, in Paris-Stanford Studies in Communications* (1962).

215 *Supra* note 205, at 4-10.

216 *Id.* at 20.

217 *Federal Cigarette Labeling and Advertising Act*, 15 U.S.C. §1331-39, Public Law 89-92, 79 Stat. 282, July 27, 1969.

> relative safety of the advertised brand .... current advertising predominantly associates smoking with romance, fun, and recreational activities ....[218]

While the explicit falsity that cigarettes are safe is no longer found in advertising appeals, the implications of safety through the association with healthy activities are not only common but seem to have become the norm. *Winston* cigarettes are sold through pictures of jet and helicopter pilots on apparent rescue missions (see Figure 4), and *Camel* is represented by a rugged-looking man shooting the rapids or camping in the wilderness. Other well-known campaigns include the "Marlboro Man" ads showing a rugged cowboy in action, and the *Virginia Slims* "suffragette" theme which pairs cigarettes with signifiers of independence and equality. Each ad portrays activities and themes not inherently related to the factual, observable, qualities of tobacco shavings stuffed into a tube of tissue paper.

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Insert Fig. 4 About Here

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These non-factual types of appeals have been called variously "social-psychological"[219], "evaluative"[220], "feeling"[221], "arbitrary"[222], and "social reality"[223] appeals, and have come to be commonplace in contemporary advertising. (The term "evaluative" will be used here). Morris B. Holbrook[224], a business professor at Columbia University, described factual content as "logical, objectively verifiable descriptions of tangible product features," and evaluative as "emotional, subjective, impressions of intangible aspects of the product." From a sample of 600 contemporary print ads, one researcher[225] found that 43.3% were evaluative.

A primary function of evaluative advertising is to differentiate competing products having no unique qualities important to a consumer's purchasing decision.[226] Since the brands have no significant factual differences, the marketers create "image" differences that imply social benefits of status or peer group acceptance, etc., to produce unique perceptions of their products. Cigarettes fit neatly into this marketing

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218 *Id.* at 8341-42.

219 Shimp, *Social Psychological (Mis)Representions in Television Advertising*, 13 J. of Consumer Affairs 28 (1979).

220 Shimp and Preston, *Deceptive and Nondeceptive Consequences of Evaluative Advertising*, 45 J. of Marketing 22(1981); Holbrook, *Beyond Attitude Structure: Toward the Informational Determinants of Attitude*, 15 J. of Marketing Research 545 (1978).

221 Golden and Johnson, *The Impact of Sensory Preference and Thinking Versus Feeling Appeals in Advertising Effectiveness*, 10 Advances in Consumer Research 203 (1983).

222 Preston, *Theories of Behavior and the Concept of Rationality in Advertising*, 17 J. of Communication 211 (1967).

223 Mizerski and Settle, *The Influence of Social Character on Preference for Social Versus Objective Information in Advertising*, 16 J. of Marketing Research 552 (1979).

224 Holbrook, *Beyond Attitude Structure: Toward the Informational Determinants of Attitude*, 15 J. of Marketing Research 545, 547(1978).

225 Marquez, *Advertising Content: Persuasion, Information, or Intimidation?*, 54 Journalism Q. 482 (1977).

226 *Supra* note 220.

strategy, and the consequence is a prevalence of evaluative ads for cigarettes. Use of such appeals in cigarette ads to imply product safety was alleged in a recent law suit.

In 1983, Robert Raney, of Indianapolis, filed a $12 million suit against R. J. Reynolds, claiming that he had been deceived through its advertising.[227] His complaint stated that the company "through its extensive advertising program, has created the impression ... that the smoking of cigarettes is a desirable act and that it could be done safely."[228] Raney claimed he suffered physical and psychological damage by inhaling smoke, lost job productivity, social contacts, and sleep because of an addiction to smoking, and that his life expectancy had been drastically shortened. His attorney argued, "The warnings on the cigarette packs are contradicted by the massive advertising campaigns that portray smoking as a highly desirable thing to do."[229]

This is an accusation that the warnings are subjugated by the products' own persuasive appeals. There appears to be no research on the relative success of the warning *vis a vis* the competing primary appeal in the ads, but some predictions can be made from existing theory. This discussion will begin by reviewing the learning theory behind the advertisers' persuasive messages, so the potential problems can be seen in light of the intentions that justify the large expenditures made in promoting cigarettes.

Associative Learning Through Observation

> *The spectator-buyer is meant to envy herself as she will become if she buys the product ... the publicity image steals her love of herself as she is, and offers it back to her for the price of the product.*[230]

Evaluative appeals depend upon associating desirable objects or situations with the promoted product. Forming this association in the consumer's mind relies upon "conditioning".[231] One form, "classical conditioning"[232], occurs when an initially neutral stimulus (the conditioned stimulus, in this case the product) is associated with another stimulus (the unconditioned stimulus, which in advertising would be the desired object or experience) connected by prior experience to some response (the unconditioned response, such as enjoyment of the activity portrayed). The conditioned stimulus is vicariously connected to the unconditioned response. So, for example, a cigarette brand is depicted in each of its advertisements in use by skiers on snow-covered mountains. The consumers, hopefully, have good feelings about past experiences with snowy mountain scenes or skiing, and those consumers will theoretically "connect" those

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227 *Led astray by cigarette ads, says smoker*, Indianapolis Star, Wednesday, June 29 1983a, p. 38.

228 *Id.*

229 Keating, *Tobacco ads upset unhappy smoker*, Indianapolis Star , July 28 1983b, p. 17.

230 Berger, *Ways of Seeing* 134 (1980).

231 For a more complete discussion of this technique, *see*, Richards and Zakia, *Pictures: An Advertiser's Expressway Through FTC Regulation*, 16 Ga. L. Rev. 77, 98 (1981).

232 Petty and Cacioppo, *Attitudes and Persuasion: Classic and Contemporary Approaches* (1983). *See also*, Allen and Madden, *A Closer Look at Classical Conditioning*, 12 J. of Consumer Research 301 (1985).

feelings to this brand of cigarettes.

The Surgeon General's warning is inherently inconsistent with the unconditioned stimuli generally used in cigarette advertising, i.e., sports and other healthful activities.[233] It is obviously improbable for a consumer to form an attitude or belief in harmony with *both* the message of the advertiser that smoking is healthy and the message of the government that it is not. If it is possible to condition attitudes with advertising, and the advertiser's persuasive message can overpower the verbal warning, then the likely result will be a positive feeling toward the product in spite of the health dangers of smoking.[234]

More to the point in cigarette advertising is whether *pictures* can direct attitudes. Mitchell and Olson[235] designed four different "uncompleted" ads, each promoting its own brand of facial tissue. One consisted solely of an explicit verbal claim of softness, while the other three offered only the brand name paired with a picture (one a kitten, one a sunset, and one of an abstract painting). Subjects were shown the ads, then tested for brand preferences and perceptions of product attributes. In spite of the explicit verbal claim in one ad, the one depicting the kitten created the strongest belief of softness.

Not only does this illustrate conditioning with visual messages, the impact of the visual mode proved greater than the verbal. It is no great logical jump to guess that a verbal warning may be impotent in the shadow of a strong visual assertion. This may help to explain why only 3% of consumers even look at the warning, since cigarette advertisements are predominantly pictorial.

Even if they do see the warning, it may not be remembered because of the overpowering visual image. Indeed, Paivio[236] discovered that subjects can remember visual stimuli even better than verbal.[237] These, however, are not the sole considerations used here to suggest possible weaknesses of these new warnings.

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233 Federal Trade Commission *Staff Report on the Cigarette Advertising Investigation* 2-2 (1981); *Supra* note 231, at 104.

234 Though conditioning was originally interpreted as a physiological response, research shows that attitudes, too, can be conditioned. An example of a conditioned affective response to advertising, where music served as the unconditioned stimulus, was found by Gorn. Gorn, *The Effects of Music in Advertising on Choice Behavior: A Classical Conditioning Approach*, 46 J. of Marketing 94 (1982). He pretested 10 music pieces on a preference scale, to find a "liked" and a "disliked" song. Next he pretested several colors of writing pens, and found two colors that rendered "neutral" responses from 80% of subjects. Finally, he tested pairings of all four combinations of the two musical pieces and the two pens. Gorn's results revealed that 79% of subjects chose the color of pen associated with the "liked" music. This strongly suggests successful attitude conditioning. Other researchers have similarly affected attitudes by conditioning. Razran, *Conditional Response Changes in Rating and Appraising Sociopolitical Slogans*, 37 Psychological Bulletin 481 (1940); Staats and Staats, *Meaning Established by Classical Conditioning*, 54 J. of Experimental Psychology 74 (1957).

235 Mitchell and Olson, *Are Product Attribute Beliefs the Only Mediator of Advertising Effects on Brand Attitude?* 18 J. of Marketing Research 318 (1981).

236 Paivio, *Imagery and Verbal Processing* 201 (1971).

237 *See, also*, Percy and Rossiter, *Mediating Effects of Visual and Verbal Elements in Print Advertising upon Belief, Attitude, and Intention Responses*, in Percy and Woodside, *Advertising and Consumer Psychology* 171 (1983). Childers and Houston, *Conditions for a Picture-Superiority Effect on Consumer Memory*, 11 J. of Consumer Research 643 (Sept. 1984).

Dissonance and Selective Exposure

The diametric opposition of the advertiser's message and that of the government, if perceived by consumers, presents a conflict. On one hand they are visually told that healthy, active people smoke, while on the other hand the verbal message says it is unhealthy to smoke. This is a classic case for application of "cognitive dissonance theory".

When people receive messages in conflict with their own beliefs, a psychological tension is created. To reduce tension, according to Leon Festinger[238], they have three alternatives. First, they can acquiesce to the new message, changing their attitude or behavior in accord with the new information. This eliminates tension by vitiating the preconception that created it. Second, they can seek information supporting their position, which consequently refutes the inconsistent information. The final alternative is changing the importance which they attach to both the prior attitude and the new information. This method diminishes the tension because it is of lesser consequence to them.

When analyzing cigarette ads in terms of the first reaction, the warning may have the desired impact. If smokers are confronted with the dangers, a simple solution to the conflict is to quit smoking. But, this method is not so easily adopted. The simple fact is that cigarettes are extremely addictive, and quitting is not always just a matter of changing ones mind.[239]

The same problem adheres under the third alternative. It is no simple matter for smokers to discount the importance of their own lives to relieve a little tension. The more likely route to consonance is the second option.

This choice suggests that people will try to find information supporting their own position, and upon finding confirmation will dismiss the dissonant message as wrong. Cigarette ads seem to fit this method of coping, since the ads typically supply *both* a dissonant verbal message and a supporting pictorial one. People who do not feel that smoking is a serious threat to their lives can find confirmation for that opinion in the positive image portrayed in the biggest portion of the ad.

For a new or prospective smoker, where no addiction is yet formed, it is possible to cope either by rejecting the smoking habit, or by minimizing the significance of the conflicting messages, possibly by rationalizing that since they smoke only occasionally the warning does not apply to them. However, when habitual smokers confront this dilemma, seeking dissonance-reducing information is probably the only viable alternative, so they "selectively attend"[240] to the supportive information and simply ignore the health warning as an inaccuracy or overstatement.

Erlich, Guttmann, Schonbach, and Mills[241] explored preferences for, or selection of, supportive

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238 Festinger, *A Theory of Cognitive Dissonance* 264 (1957).

239 *Supra* note 205, at 1-46; Flaxman, *Quitting Smoking Now or Later: Gradual, Abrupt, Immediate, and Delayed Quitting*, 9 Behavior Therapy 260 (1978).

240 Jecker, *Selective Exposure to New Information*, in Festinger, *Conflict, Decision, and Dissonance* 65 (1964).

241 Erlich, Guttmann, Schonbach, and Mills, *Post-Decision Exposure to Relevant Information*, 54 J. of

information by showing recent purchasers of automobiles eight envelopes supposedly containing ads for different brands of cars, and asking them to choose which they would prefer to read. Over 80% of the subjects chose an envelope containing ads for the cars they had just purchased, while chance would predict that only 25% would so choose. There seems a tendency for people to pick the messages that reaffirm their own positions. Childs[242] notes that, "Innumerable studies show that readers tend to read what they agree with, approve, or like."

Actually, studies continue to reveal *both* avoidance of and preference for opposing information, depending upon numerous factors.[243] M. T. Feather, before the first warnings were required, discovered that when smokers and nonsmokers were asked to rank their interest in several types of magazine articles, one of which was either "Smoking Leads to Lung Cancer" or "Smoking Does Not Lead to Lung Cancer," smokers displayed greater interest in *both* articles than did nonsmokers. This researcher also found, however, that smokers "are more critical of evidence that cigarette smoking leads to lung cancer than are nonsmokers. They are more likely to rate this evidence as unconvincing."[244] While this predicts that they may not avoid the warning in cigarette ads, they will probably discount or counterargue its substance because of the magnitude of their convictions. The above description of selective exposure and attention ignores several factors, one of which is *magnitude* of discrepancy between the prior conviction and the new information.

Sherif, Sherif, and Nebergall[245] offer an assimilation-contrast theory, that when new information received is not *grossly* discrepant from prior-held beliefs, a person may accommodate this information by perceiving it as being closer to their own position than it really is, and subsequently shift their position in the direction of the new information. However, when the message is highly divergent from their position a "boomerang effect" can result; receivers move their own position even farther from the advocated position. For cigarette ads this could mean that borderline consumers, again, would be persuaded, but confirmed smokers will more adamantly believe their health will not suffer. This "boomerang" of cigarette warnings was found in one experiment.

One of the few published studies to experimentally test the efficacy of cigarette health warnings[246] looked at the warning used in Great Britain. The warning used there, including tar content, is, "Warning by HM Government. Smoking can damage your health. High/Low/Middle Tar." These researchers submitted 48 housewives to alternating alcohol and cigarette ads in a slide presentation (49 ads, total). Upon viewing

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Abnormal and Social Psychology 98 (1957).

242 H.L. Childs, *Public Opinion: Nature, Formation, and Role* 181 (1965).

243 *See, e.g.*, Sweeney and Gruber, *Selective Exposure: Voter Information Preferences and the Watergate Affair*, 46 J. of Personality and Social Psychology 1208 (June 1984).

244 Feather, *Cognitive Dissonance, Sensitivity, and Evaluation*, 66 J. of Abnormal and Social Psychology 157, 161 (1963).

245 Sherif, Sherif, and Nebergall, *Attitude and Attitude Change* (1965).

246 Hyland and Birrell, *Government Health Warnings and the 'Boomerang' Effect*, 44 Psychological Reports 643 (1979).

each slide the subjects filled in four scales regarding ad quality, its familiarity, desire for a drink, and desire to smoke a cigarette. While the results are far from conclusive, the presence of a warning *increased* desire to smoke, suggesting a boomerang effect.[247]

If the coping mechanisms described by Festinger are at all accurate, theories about cognitive dissonance and selective exposure to supportive information may be helpful in critically weighing the validity of the present regulatory approach to warning the public about health risks of smoking. This approach points to some value of the warnings for marginal smokers, but suggests it may "boomerang" with the population at the greatest risk: the heavy and addicted smoker. Admittedly, there is evidence that in certain situations subjects show a preference for information that is contrary to their own position.[248] This only reinforces the need for further study by the FTC directed at the specific effects of the warning in its normal context, competing with commonly used evaluative visual claims. One additional theory which will be considered here is consumer involvement in cigarette ads.

Involvement

For nearly 30 years the predominant theories of advertising communications have been "hierarchical," stating basically that knowledge leads to attitude which leads to behavior.[249] In 1965, however, Herbert E. Krugman presented a new theory of "low involvement." This theory posited that, when viewing advertising requiring only minimal cognitive activity, behavior may *precede* attitude.[250]

Where subjects are highly involved with a product, such as where the product represents a major expenditure, they are likely to spend time digesting information about that product, comparing its features to competing brands. This is a "high involvement" condition, where a hierarchical model would apply. Many products, however, like toothpaste or cigarettes, require a lesser involvement, because a "wrong" purchase decision is of minor consequence. Next time he or she can try a different brand. This small commitment suggests low involvement. High involvement, then, requires more judgmental mental activity and greater time for assessment than does the low involvement. Smith and Swinyard[251] review many of the relevant studies on low involvement since Krugman's original proposal, and note that while new conditions and complexities have been identified, it remains a theory substantially intact.

Krugman[252], expounding on his theory, believes that "quick and/or faint perceptions of product

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247 This effect, however, was not constant over all of the ads.

248 Freedman, *Preference for Dissonant Information*, 2 J. of Personality and Social Psychology 287 (1965).

249 Lavidge and Steiner, *A Model for Predictive Measurements of Advertising Effectiveness*, 25 J. of Marketing 59 (1961).

250 Krugman, *The Impact of Television Advertising: Learning Without Involvement*, 29 Public Opinion Q. 349 (1965).

251 Smith and Swinyard, *Information Response Models: An Integrated Approach*, 46 J. of Marketing 81 (1982).

252 Krugman, *Memory Without Recall, Exposure Without Perception*, 17 J. of Advertising Research 7, 11 (1977).

advertising, even unremembered, do their job in most cases .... I suggest that ads are meant to be looked at, to communicate as quick as a wink .... The real ad is what's to look at." This argument makes sense, since print ad viewing times average only about four seconds.[253]

In other words, much of advertising, because of these minute exposure times, depends upon low involvement processing. According to Krugman, they depend more upon repetition than time spent scrutinizing the ad. This means, he concludes, that the pictures in the ads are crucial to their success, so that the *sight* of the product on the shelf of a store will "trigger" recognition of that product-association formed through the conditioning process. This is because consumers will not take the time to read verbage in an ad and then rehearse the information sufficiently to form an attitude. Krugman[254] states, "The future of low-involvement theory is in this non-verbal area."

This line of thought hints that the diminutive print of the Surgeon General's warning may require a higher level of involvement and cognitive activity than is normally dedicated to a highly visual ad for an extremely low involvement type of product. This is especially salient, since the warning occupies only 2-3 percent of a typical 8 1/2 x 11 inch magazine advertisement.[255] (See Figure 5) Only enough of the ad is "seen" to be able to later *recognize* the association formed about the product through repeated exposure, not to *recall* the advertisement.[256]

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Insert Fig. 5 About Here

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Krugman[257] identifies recognition as picture memory, and recall as verbal comprehension, so it should be a simple matter for the FTC to sort-out some of this relationship between ad and warning by testing *both* recognition and recall of the ads and their warnings. Such a study would help us understanding of the impact of the health warnings, and give further insight into the workings of advertising communications in general.

This review highlighted only a few of the theories and findings apparently unknown to the FTC.[258] Thought should likewise be given to work in other areas of communication theory. The selection included here was chosen, not because they "prove" inadequacy of the new warning scheme, but because they raise serious doubts that should be confronted if regulatory efforts are to be maximized. *Will the new warnings*

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253 Batra and Ray, *Advertising Situations: The Implications of Differential Involvement and Accompanying Affect Responses*, in Harris, *Information Processing Research in Advertising* (1983).

254 *Supra* note 252, at 9.

255 In re Lorillard et al. 80 F.T.C. 455, 461 (1972), *aff'd* 527 F.2d 1115 (1975), *cert. denied*, 96 S.Ct. 2237 (1976).

256 "Recognition" of something entails viewing the item and remembering having been exposed to it in the past, like recognizing a face without remembering where you have seen it. "Recall" involves the ability to call an item out of memory without the help of first seeing it, just as you might be able to tell someone the name of your high school English teacher without looking back in your yearbook.

257 *Supra* note 252.

258 *Supra* note 205.

be effective? There is cause for doubt. However, with sufficient research more effective alternatives would probably be discovered.

OUT OF THE ASHES OF A BAN

If this ban were to be approved by the courts, ignoring the strong arguments against it, the aftershocks would very probably be substantial. First would come the economic fallout which would drop on the houses of the print media.[259] Removal of tobacco advertising from magazines, alone, would mean a loss of about $340 million per year in revenues, which translates to a minimum loss of 10,000 jobs.[260] Tobacco ads account for about eight percent of magazine revenues.[261] This is a non-trivial blow to our otherwise free press.

A second consequence is the elimination of tobacco company sponsorship of athletic, artistic, and other socially beneficial events. Without the public relations benefits adhering to such sponsorship, support will surely dwindle. Not only will the speech of these advertisers no longer be "free," the artistic and athletic expression of others will be injured.[262]

A third probability is the extension of this new regulatory technique to other questionable products.[263] Alcohol advertising is the first likely candidate for prohibition. The most serious question, however, is whether or not it would stop there. For example, little would remain to prevent the government from intervening to protect children from the advertising of sweets or toys. After that we might expect prohibitions on the advertising of offensive products like controceptives. The government would certainly promise to administer this tool sparingly, but when the First Amendment is removed from consideration, there is no longer a system of checks and balances to assure that this promise is kept.

Each of these three impacts trammels rights of many outside the tobacco industry. These ramifications cannot be ignored when testing this regulatory action under the First Amendment.

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259 William F. Gorog, President of the Magazine Publishers Association, testified to the Congressional subcommittee:

> [T]he right to advertise lawful products or activities in a truthful manner, in our view, is an important element of constitutional liberties. It is so because without revenues from advertising, there really is no "free press." It's the life blood of successful publishing, and it has been since the industry started. It is as necessary to a free press as the freedom of a pamphleteer to peddle his views or a Member to address the House without fear of prosecution.

Statement of William F. Gorog, before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce, United States House of Representatives, Hearing on Tobacco Advertising and Promotion, August 1, 1986.

260 *Id.*

261 *Id.*

262 *Supra* note 143. Mr Lynn claims, "[W]hen sponsorship of events is effectively banned ... the collateral First Amendment implications are significant."

263 Commissioner Loevinger, of the Federal Communications Commission, stated several years ago that "[t]he Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health." WCBS-TV, 11 R.R.2d 1901, 1943 (1967).

The fourth and fifth probable impacts, ones which should concern the supporters of the ban, would represent backfires of this effort to improve the health of Americans. Research into the effects of tobacco advertising bans in other countries have discovered that advertising has been instrumental in the conversion of smokers to filtered and low-tar cigarettes.[264] Removal of this advertising could cause a slow-down in switching consumers to less hazardous tobacco products.

Along with abolition of advertising will almost certainly go the incentive of tobacco companies to develop newer and healthier smokes.[265] Research and development for products is driven by the monetary impetus of attracting consumers away from competing products that do not have these new features, and if these newly created benefits cannot be communicated consumers will not change brands.

These last two effects are not only disincentives to the pursuit of a ban, they also represent factors for consideration by a court when assessing the Constitutional validity of an advertising ban. Under the third part of the *Central Hudson* test, requiring that the regulatory action directly advance a substantial government interest[266], any advancement of the interest in question is effectively offset by any exascerbation of that interest caused by the action.

Finally, the inability of tobacco companies to use advertising will construct a nearly insurmountable barrier of entry into this market by new competitors. In that way it will actually aid existing tobacco companies in warding off competition.[267]

According to newly appointed FTC Chairman, Daniel Oliver, a ban is "more likely to harm consumers than to help them."[268]

CONCLUSION

The present challenges to tobacco advertising are substantial, but the most serious of these is one which could infect the speech rights of all advertisers. Although Congress did not enact the Synar Bill into

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264 M. J. Waterson, *Advertising and Cigarette Consumption* 7 (The Advertising Association 1984); Statement of William F. Gorog, *supra* note 259; American Newspaper Publishers Association, *Tobacco Advertising Band and the First Amendment*, Legal Memorandum (July 1986).

265 Association of National Advertisers, *A.N.A. Calls Tobacco Ad Ban Proposal Unconstitutional, Calls for Consideration of "Lesser Restrictions" Under Central Hudson and Posadas*, News Release, August 1, 1986; J. J. Boddewyn, *Tobacco Advertising Bans and Consumption in 16 Countries* (International Advertising Association 1986); Waterson, *supra* note 264.

266 *Supra* note 113.

267 John C. Maxwell, Jr., an industry analyst for Furman, Selz, Dietz, Mager & Burney in New York, made the following prediction about the effects of an ad ban:

> It would be the best thing that ever happened to Philip Morris and Reynolds, because it would freeze the trend, and Philip Morris and Reynolds are growing to the detriment of practically everyone else ... It would be very hard to introduce a new cigaret.

Gloede, *Lotsa Smoke, No Fire*, Advertising Age, August 4, 1986, p. 1, c. 2. Together, R.J. Reynolds and Philip Morris at yearend of 1985 held about 67.5 percent of the entire U.S. domestic cigarette market. *Id.*

268 Colford, *White House Against Ban on Tobacco Ads*, Advertising Age, August 14, 1986, p. 1, c. 4.

law during 1986, Congressman Synar re-introduced the Bill on February 18, 1987.[269] An infestation of this magnitude is one which endangers the rights of every citizen. The logic supporting this attack is faulty, but such invalid logic has already condemned the right of gambling casino owners in Puerto Rico.

It is certainly possible to criticize insufficient regulation of advertising practices[270] and illogical attempts by the advertising industry to disarm the regulators.[271] There is a universe of difference, however, between assuring that commercial information flows cleanly, and squeezing off the flow altogether. Advertising is important to the perpetuation of this society, and it serves the functions of informing consumers about features and availability of products and moving commerce to keep the people employed. It is a form of speech. Sellers have a right to speak, even if that speech is commercial in orientation, and consumers have the concomitant right to hear what these sellers have to say. Prohibition of speech is not a proper means of controlling purchase behavior in a free society, and this is an especially eggregious consideration when all available evidence indicates that advertising bears no rational relationship to the behavior in which the government asserts an interest.

It is not the responsibility of regulators to deter smoking, but to ensure that a decision to smoke is an informed assumption of risks.[272] Without assessing the impact of the Surgeon General's warnings through empirical research there can be no such assurance of an informed freedom of choice. Both theory and research suggest that the new efforts to increase effectiveness of the warning, while a step in the right direction, may not be accounting for some of the greatest threats to communication of these health hazards.

In all fairness, the Commission did conduct extensive research, including surveys and the advice of consultants. Through this investigation it learned, e.g., that 30% of the public was unaware of a relationship between smoking and heart disease and 20% did not even know that smoking causes cancer. Its studies, however, focused primarily on attitudes, knowledge, and beliefs about smoking, and the efficacy of a more informative warning *compared to the older warning*. Little attention was dedicated to overcoming the *competition*, which it acknowledged, between the advertiser's message and the warning.

In 1970, prior to the ban of cigarette advertising on the broadcast media in 1971[273], the cigarette

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269 The Bill was introduced in the 100th Congress as H.R. 1272. *See* 45 Congressional Quarterly Weekly Report 334 (1987). *See, also*, Colford, *Tobacco ad foes press fight*, Advertising Age, February 23, 1987, p. 12, c. 1; Meddis, *Push to ban tobacco ads moves to Congress*, USA Today, February 17, 1987, p. 7A, c. 1. Although no similar legislation was introduced in the Senate, Senator Ernest Hollings (D., S.C.) soon thereafter announced his intention that the Senate Commerce Committee would claim jurisdiction over the legislation. *See, Hollings aims at ad bans*, Advertising Age, March 16, 1987, p. 8, c. 1. In addition, the American Bar Association House of Delegates, during a mid-February meeting, voted on a resolution to support the ban of tobacco advertising, but the resolution was defeated after a heated debate. *See, ABA Rejects Tobacco Ad Ban*, 73 ABA J. 32 (April 1987).

270 *Supra* note 231.

271 Preston and Richards, *Consumer Miscomprehension as a Challenge to FTC Prosecutions of Deceptive Advertising*, 19 J. Marshall L. Rev. 605 (1986).

272 Cipollone and Cipollone v. Liggett Group, Inc., et al., Slip Op., Civil Action No. 83-2864, Sept. 20, 1984 (D.C. New Jersey).

273 *Public Health Cigarette Smoking Act of 1969*, 15 U.S.C. §1331 et seq.

industry spent a total of about $50 million for advertising, and by 1979 it had risen to $260 million.[274] This is a powerful and pervasive source of persuasive communications. If not effectively countered, the void of appropriate health information may only grow larger, possibly reaching a point where the accumulated effect of these promotions are beyond the ability of the government correct.

The FTC, in studying the effect of anti-smoking commercials aired on television from 1968 to 1970, found that no decline in smoking was realized by this advertising, nor did smoking increase when the commercials were withdrawn in 1971.[275] A repeat performance might well be avoided if due consideration is given to communications theories and empirical research.

In 1972, at the time the FTC required inclusion of the warning into print advertising, Commissioner Mary Gardiner Jones submitted a written dissent:

> The Commission had no proper empirical or clinical basis on which to support the instant order provisions and hence had no reason to believe that the required disclosures would in fact be clear and conspicuous to the casual readers of the magazines in which these advertisements are intended to appear.[276]

The present analysis spotlights some of the potential problems not addressed by the new warning scheme. While these problems are unconfirmed by research, their mere possibility demands further study. Through such research a more effective design might be discovered. It might be found that introduction of an iconic warning, like a skull and crossbones, would enable the reader to process both messages in the same visual modality, thereby eliminating the discrepant efficacy of visual and verbal messages. Another option could be to replace the present warnings with counter-advertisements of like size and design to be published for every cigarette ad used. Perhaps the warnings merely need to be larger, to circumvent the size advantage of the advertiser's message.

The resultant findings of concerted research into the best means of effectively informing the public of the hazards of smoking, and persuading consumers to abandon the habit, would help pro-ban advocates to achieve their goals without offending the tenets of the First Amendment. While infringement of free speech appears to be of little concern to them, at least in comparison to the evil they combat, research findings currently available indicate that the proper approach to their goal, like that of the First Amendment, is *more* speech, not *less*.

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274 *Cigarette Firms Tripled Outlays for Ads in '70s*, Denver Post, Sept. 4 1981, p. 69F.

275 Federal Trade Commission, *Staff Report on Consumer Responses to Cigarette Health Information* 7 (August 1979).

276 In re Lorillard et al. 80 F.T.C. 455, 458 (1972), *aff'd* 527 F.2d 1115 (1975), *cert. denied*, 96 S.Ct. 2237 (1976).

THIS IS KNOWN BY *Medical Authorities about* PHILIP MORRIS

WHEN SMOKERS CHANGED TO PHILIP MORRIS, EVERY CASE OF IRRITATION OF NOSE OR THROAT—DUE TO SMOKING—EITHER CLEARED UP COMPLETELY, OR DEFINITELY IMPROVED!

Facts reported in medical journals on clinical tests made by distinguished doctors . . . Proving this finer cigarette is less irritant!

FIGURE 1. This advertisement appeared in Time magazine in May, 1944. Claims of curative powers were not uncommon at this time.

Every doctor in private practice was asked:

—family physicians, surgeons, specialists...
doctors in every branch of medicine—

"What cigarette do you smoke?"

According to a recent Nationwide survey:

More Doctors Smoke Camels

than any other cigarette!

Not a guess, not just a trend . . . but an actual fact based on the statements of doctors themselves in 3 nationally known independent research organizations.

The "T-Zone"—T for taste and T for throat—is your own laboratory, your proving ground, for your cigarette. For only your taste and your throat can decide which cigarette suits him best... and how it affects your throat. On the basis of the experience of many, many millions of smokers, we believe Camels will suit your "T Zone" to a "T."

Yes, your doctor was asked . . . along with thousands and thousands of other doctors from Maine to California.

And they've named their choice—the brand that more doctors named as their smoke is Camel! Three nationally known independent research organizations found this to be a fact.

Nothing unusual about it. Doctors smoke for pleasure just like the rest of us. They appreciate, just as you, a mildness that's cool and easy on the throat. They too enjoy the full, rich flavor of expertly blended mellow tobaccos. Next time, try Camels.

FIGURE 2. This was the back cover of Time magazine on January 14, 1946.

I'M SENDING CHESTERFIELDS to all my friends.
That's the merriest Christmas any smoker can have —
Chesterfield mildness plus no unpleasant after-taste
Ronald Reagan
Chesterfield
CIGARETTES
CHESTERFIELD
Buy the beautiful "Christmas-card" carton

FIGURE 3. It is interesting to note, given the stand of the Reagan administration against the tobacco advertising ban, that Mr. Reagan formerly served as a spokesperson for one of the major cigarette brands.

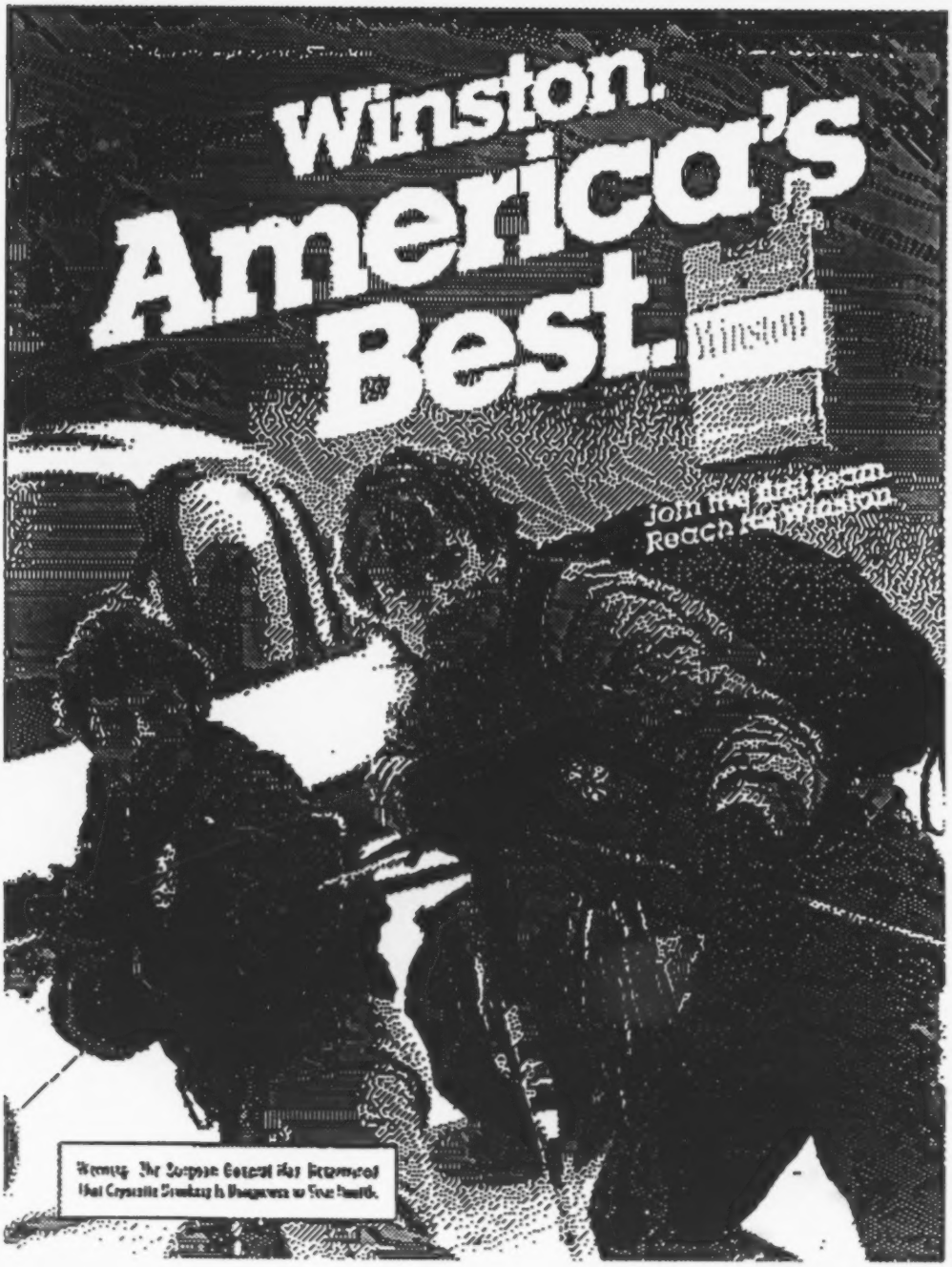
Winston.
America's
Best.
Winston
Join the first team.
Reach for Winston.

FIGURE 4

FIGURE 5. Billboards advertising cigarettes are especially notable for the predominance of their primary message over the virtually unnoticeable message from the Surgeon General, which typically appears at the very bottom of the display. The warnings are frequently unreadable while travelling at highway speeds, but the primary message is easily conveyed to passersby.